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AMERICAN BAR ASSOCIATION

JOVRNAL

AUGUST, 1933

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VOL. XIX No. 8
Price: Per Copy, 25c; Per Year, $3; To Members, $1.50
Published Monthly by The American Bar Association at 1140 North Dearborn Street, Chicago, Illinois
Entered as second class matter Aug. 25, 1930, at the Post Office at Chicago, Ill. under the Act of Aug. 24, 1912

The Law of Averages in Investments

The law of averages, which forms the basis of the insurance business, is observed in the investment of insurance funds as well as in the assumption of risks. In the case of The Travelers Companies, the percentages of assets held in various forms are as follows:

	Per Cent
U. S. Government Securities	12.2
Other Public Securities	13.3
Railway Securities	11.8
Public Utility Securities	11.0
Other Securities	6.1
First Mortgage Loans	15.6
Real Estate	3.9
Loans on Company's Policies	17.6
Cash on Hand and in Banks	2.7
Interest Accrued	1.5
Premiums Outstanding and Deferred	4.2
All Other Assets	0.1

THE TRAVELERS INSURANCE COMPANY

(Sixty-ninth Annual Statement)

Assets as of December 31, 1932 totaled . $674,492,525.31

including over $95,631,000. of cash and U. S. Government bonds and, in addition, substantial amounts of other marketable securities. These are held to meet the Company's various obligations promptly as presented.

Liabilities as of December 31, 1932

Capital	$ 20,000,000.00
Surplus	18,139,869.67
Contingency and Special Reserves	15,817,551.50
Other Reserves and Liabilities	620,535,104.14
Total Liabilities	**$674,492,525.31**
Paid to Policyholders in 1932	$112,996,437.14

THE TRAVELERS INDEMNITY COMPANY

(Twenty-seventh Annual Statement)

Assets as of December 31, 1932 totaled . $20,120,434.94

including over $3,483,000. of cash and U. S. Government bonds and, in addition, substantial amounts of other marketable securities. These are held to meet the Company's various obligations promptly as presented.

Liabilities as of December 31, 1932

Capital	$ 3,000,000.00
Surplus	4,289,107.90
Contingency and Special Reserves	3,769,367.99
Other Reserves and Liabilities	9,061,959.05
Total Liabilities	**$20,120,434.94**
Paid to Policyholders in 1932	$3,927,284.47

THE TRAVELERS FIRE INSURANCE COMPANY

(Ninth Annual Statement)

Assets as of December 31, 1932 totaled . $16,054,586.48

Including over $4,931,000. of cash and U. S. Government bonds and, in addition, substantial amounts of other marketable securities. These are held to meet the Company's various obligations promptly as presented.

Liabilities as of December 31, 1932

Capital	$ 2,000,000.00
Surplus	1,548,110.18
Contingency and Special Reserves	1,952,305.12
Other Reserves and Liabilities	10,554,171.18
Total Liabilities	**$16,054,586.48**
Paid to Policyholders in 1932	$4,019,759.02

THE TRAVELERS

L. EDMUND ZACHER, President

THE TRAVELERS INSURANCE COMPANY — THE TRAVELERS INDEMNITY COMPANY

THE TRAVELERS FIRE INSURANCE COMPANY

HARTFORD — CONNECTICUT

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Stern Responsibilities

Upon a company's corporate agent there may be served process which not only calls for appearance in court upon a certain date, but, buried for the inexperienced eye, commands the corporation to desist from certain acts in the meantime; or process which summons for appearance upon a certain day and then further on demands a preliminary appearance upon a much earlier day; or process which for the company's full protection requires notification not only to the company's attorney, but immediately to some other representative in the state, or perhaps to its liability insurance company; or process of such nature that it demands telegraphic or telephonic transmittal.

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AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XIX AUGUST, 1933 NO. 8

A National Bar Program and the Coordination Movement

AT the direction of the Executive Committee the Committee on Coordination has been gathering material and information for the establishment of a National Bar Program and designed to bring about active cooperation by the principal associations of the country. The movement for this concrete and practical expression of bar coordination will be inaugurated at a meeting of the representatives of the State Bar Association and of a number of the principal city associations which has been called for Tuesday, August 29th, at Grand Rapids. The meeting will discuss the plan for a National Program of work on selected topics for the coming year, to be carried on simultaneously by the American Bar Association and the State and regional bar organizations. The president and secretary or other delegate has been invited from every state association and many large city associations. The plan of cooperation will be explained, discussed and, it is expected, much stimulated by this meeting.

The plan proposed has as its core the selection of several topics (such, for example, as "Unauthorized Practice," or "Disciplinary Procedure in the Bar" or "Judicial Selection" or "Jurisdiction of the Federal Courts" or "Negligence Practice") upon which the work of the national and other associations can be centered for the year and in which their programs, committee work and finally bar opinion can be consolidated. This is the first program ever proposed for a nation-wide organization of the actual work of the numerous lawyer's societies. It offers a prospect for the first time of a very wide expression of professional study and opinion on the topics selected and for an impressive means of conveying the considered judgment of the lawyers to the public and the government. Hitherto the expressions of the American Bar Association and the other state or regional societies have been often treated as views, not of the whole profession, but of parts of it only. The prospect of a general exchange of facts, suggestions and opinions on the selected topics should enable the American Bar Association to speak with and in behalf of the united Bar of the country with knowledge and authority.

The plan in general has been under discussion by the Committee on Coordination and the General Council since last winter. A list of topics is under preparation and will be submitted to the General Council and other bodies at the Annual Meeting. Not more than five specific topics will be finally designated. The President's conference is an important contribution to the project. It supplements but does not, of course, infringe on the regular annual session of the Conference of Bar Delegates, which has a permanent existence and a wide purpose. Many delegates will no doubt attend both conferences.

Rules and Regulations under the Securities Act of 1933.

ON July 6, 1933, the Federal Trade Commission promulgated rules and regulations under the Securities Act of 1933, effective from that date. These rules provide that the registration statement shall be in the form prescribed by the Federal Trade Commission and in effect upon the date of filing and shall contain the full and complete information required or called for by the several questions, directions, instructions, and other requirements set forth in said form of registration statement.

The registration statement and all other papers required to be filed must be submitted in triplicate, and the date of filing is the date on which the papers are actually received by the Securities Division,

Federal Trade Commission, Washington, D. C., provided the statute, rules and regulations have been complied with and the required fee of one one-hundredth of one per centum of the maximum aggregate price at which the securities are proposed to be offered (but in no case less than $25), has been paid.

The registration statement and all information filed in connection therewith will be open to the public for inspection and examination, except any portion of a contract, the disclosure of which the Commission determines would impair the value thereof and would not be necessary for the protection of the investors. Copies will be furnished upon request and upon payment of 20c per page for photostatic copies and 15c per page for typewritten copies. Estimates will be furnished to any person desiring to purchase such copies.

The Commission will not recognize any person as a certified accountant who is not duly registered and in good standing under the accounting laws of the state of his residence or principal office, nor as a public accountant unless duly recognized, in good standing and entitled to practice as such. A certified or public accountant will not be recognized as independent with respect to any person in whom he has any interest, directly or indirectly, or with whom he is connected as an officer, agent, employee, etc.

The rules make provision for the contents of prospectuses, five copies of which must be filed. In the computation of time, Sundays and legal holidays shall be counted in the same respect as business days.

With respect to gold obligations, the rules provide:

"When the issuer continues to sell subsequent to July 26, 1933, securities which in compliance with the provisions of the indenture (mortgage) purport to give the obligee the right to require payment in gold coin or a particular kind of coin or currency of the United States, such security shall have printed in type, the size and kind used on the face of the security, a statement substantially as follows:

"'The within provison that the principal of and interest on this bond is payable in gold coin of the United States of America of the standard of weight and fineness existing on the —— day of ——— was included therein in compliance with the terms of the within described indenture (mortgage) which was executed prior to the approval, on June 5, 1933, of Public Resolution No. 10 of the 73rd Congress. Specific attention is called to the fact that said Public Resolution provides in part as follows:

"'Every obligation heretofore or hereafter incurred whether or not any such provision is contained therein or made with respect thereto shall be discharged upon payment dollar for dollar in any coin or currency which at the time of payment is legal tender for public and private debts.'"

Hearings shall be public and may be held before the Commission or an officer or officers thereof and any person appearing as counsel or representative of any registrant for the transaction of any business before the Commission under the Act must file with the Commission in writing due authorization to act as such counsel or representative.

Newest Type of Bar Association

THE first number of the first volume of the "Duke Bar Association Journal," attractive in size, appearance and contents, has come to this office, again calling attention to the newest type of bar association to enter the field of legal organization. The new publication is the official organ of this student bar association, just as the American Bar Association Journal and the Journals of the various State organizations are the official organs of their respective associations. A Foreword by Dean Justin Miller of the Duke University Law School states that "in introducing this publication to its readers the editors realize that they are undertaking an experiment in legal journalism."

An article in this first issue tells about the Duke Bar Association, the form of organization of which "is based upon that of the American Bar Association." It concludes with the statement that the whole purpose of the association is to "teach the law student methods of professional conduct, to train him in the work of bar associations and to develop the correct sense of professional responsibility. These points cannot be emphasized too strongly. In the past, law schools have attempted to accomplish somewhat the same things by requiring the student to pursue a study of legal ethics, which in the main consisted of but little more than a series of lectures by a member of the bar or of the faculty. It is a general feeling among law school teachers that this system is inadequate and the results most unsatisfactory. It is felt that student bar associations, similar to the Duke Association, may help in the solution of the problem, and prove themselves to be the missing link in the chain of legal education."

Cleveland Bar's Post-Graduate Courses

THE educational activities of The Cleveland Bar Association have been so enlarged during recent years that now what amounts to a post-graduate course is conducted for the younger members of the Bar, according to the press release. For the older practitioners programs are carried on to keep them abreast of the very latest developments of all phases of the law. During the fiscal year of the Association which closed May 2nd, eighty-one speakers addressed as many meetings in the various sections of the Association. The educational activities are divided into four sections:

1. The monthly meetings, at which lawyers who have specialized in the practice of certain phases of the law speak on those subjects. The talks are prepared with a view to giving the general practitioner the very latest developments in these phases of the law. The meetings open at 5:30 with dinner and adjourn not later than 8:00 P. M. William H. Boyd, President last year, presided at the Bar meetings.

2. The Institute given twice a year, six lectures being delivered at each Institute. Teachers in leading American Law Schools are brought to Cleveland to speak in this series, which was designed to keep the Cleveland lawyers posted on the work of the American Law Institute and also to provide a more intensive review of a phase of the law than is provided in the monthly meetings. Walter L. Flory, Chairman, and James B. Dolphin, Vice-Chairman, were in charge of the Institutes.

3. Informal Conferences for younger members of the Bar. Invitations to these meetings are sent to approximately six hundred lawyers who have been admitted to the Bar three years or less. Meetings are held twice a month at 7 P. M., admis-

sion free. Howard E. Hendershott, Esq., served very capably as Chairman of this group.

4. Noon Luncheon Groups, ten to fifteen in each group, made up of lawyers in either their first, second or third year of practice. These groups get together at noon in private dining rooms at a round table with judges, experienced lawyers and men occupying key positions in the courts for informal discussions with periods for questions and answers. The group luncheons start at 12:15 and adjourn at 1:30. These group leaders were organized by selecting young lawyers who in college had shown evidence of leadership and making each one leader of a group and charging him with responsibility for the speaker, the subject and the attendance. This section was not organized until December.

The total attendance at all of the meetings of an educational character during the year ending May 2, 1933, was 4,752. Attendance at the monthly bar meetings was 1,719, at the Institutes 1,150, at the Informal Conferences 1,491, and at the Noon Luncheon Groups 392.

A Florida Concordat With Corporate Fiduciaries

A DECLARATION of principles was recently adopted by an exchange of resolutions between the Bar Association of St. Petersburg, Fla., and the corporate fiduciaries of that city, according to a statement by Mr. E. C. Watson, chairman of the Committee on the Unauthorized Practice of Law of the local bar association. Mr. Watson says that his committee "borrowed liberally from similar declarations or codes effective in the States of Massachusetts and Pennsylvania; although many variations in phraseology have been introduced. . . It is believed that this declaration is the first of its kind to be adopted in the State of Florida." Some of the declarations covering familiar points which were adopted are as follows:

"The banks and corporate fiduciaries should not solicit directly or indirectly, persons to have wills, trust agreements or other legal papers drawn by their own employees, representatives, agents or attorneys.

"The word 'solicit' as hereinabove used, shall not be construed to mean that the banks may not advertise the advantages of a Florida corporate fiduciary or that such persons may not be solicited to name the particular bank as executor or trustee. The word 'solicit' shall be construed, however, to include any service in connection with the drafting or preparation of the proposed will or trust agreement which is comprehended by the term 'practice of law.'"

"A corporate fiduciary should advise all persons desiring to nominate it as executor, trustee, guardian or other fiduciary, that such person should employ his own attorney to draft the will or trust agreement in the first instance. The gross impropriety of the practice of preparing wills or trust agreements by an attorney who represents, at the same time, the trustor and trustee is recognized as a matter of principle. In no case should the corporate fiduciary draw wills, codicils or trust agreements."

"A customer of a corporate fiduciary should have full opportunity to consult with the lawyer who prepares his will or trust instrument without any officer or employee of the fiduciary being present. The relationship of lawyer and client is particularly confidential in such cases and the opportunity for private consultation should be insisted upon."

"When a customer indicates to a corporate fiduciary his choice or selection of a particular attorney whom he desires to draw his will or trust agreement, the corporate fiduciary should not, in the absence of well founded reasons, discourage or influence the customer against the attorney of his own choice; nor should an attorney when his client indicates his choice or a selection of a corporate fiduciary to act under his will or trust instrument, in the absence of like good reasons, discourage or influence the client against his choice of a corporate fiduciary."

"In the selection of a lawyer to represent a bank with regard to any particular estate, it should be the practice to employ the one who drew the will or trust agreement, provided the bank believes him to be competent to handle the work and reasonable in his charges, and the fact of his selection by the testator or the trustee shall be prima facie evidence that he is competent."

"Banks and corporate fiduciaries ought not to advertise the fact that they maintain legal departments, if such be the fact, nor should they give legal advice or otherwise engage in the practice of law. The preparation of legal instruments, forms of minutes of corporate proceedings and the drafting of leases, contracts, deeds and mortgages in matters or transactions in which the bank or corporate fiduciary has no direct or primary interest, are recognized as improper unless done in co-operation with attorneys not in their employ. The mention of the foregoing acts is not intended to constitute a definition of what may constitute the practice of law, but are set out as examples only.

"However, in cases where a bank acts as escrow agent, it may prepare a simple form of escrow agreement in connection with such escrow, but should in no case undertake to act as attorney for either of the escrow parties and will in all cases so advise and caution the parties."

Members Whose Deaths Have Been Reported

Rodney Augustus Mercur, of Towanda, Pa., on March 31st. Mr. Mercur joined the Association in 1887 and had served on the Executive Committee. He practiced law in Towanda since 1875 and for many years was president of the Bradford (Pa.) County Bar Association.

Benjamin Alexander, of Philadelphia, Pa., on Feb. 12th. Mr. Alexander had been a member for the past twenty-four years.

William M. Alsop, of Vincennes, Ind., on April 30th.

Walter Bennett, of Phoenix, Ariz., a member for the past five years.

James Campbell, St. Louis, Mo., February 6th.

Robert A. Brannigan, of New York City, on June 3rd. Mr. Brannigan had been a member since 1924.

Harry L. Cohn, Long Beach, Calif., a member for the past six years, in March of this year.

Charles F. Cole, of Batesville, Ark., on January 22nd last. Mr. Cole had been a member for ten years.

W. F. Cole, Webster City, Ia., a member for the past four years, on April 14th.

William Taylor Andrews, Stamford, Conn., who joined the Association five years ago, on Feb. 19th.

O. Ellery Edwards, New York City, a member for the past twenty years, on May 10th.

J. Howard Patterson, of Philadelphia, Pa., on April 24th. Mr. Patterson joined the Association in 1924.

Ernest Hopkinson, of New York City, a member since 1930, on May 3rd.

Robert H. Ingersoll, of Atlantic City, N. J. Mr. Ingersoll joined the Association eight years ago.

Earle R. Jenner, of Seattle, Wash., in March of this year. Mr. Jenner had been a member for ten years.

George J. Miller, of Chicago, Ill., on April 10th. Mr. Miller joined the Association in 1921.

Thomas J. O'Brien, of Grand Rapids, Mich. Mr. O'Brien had been a member of the Association since 1885.

C. D. Pope, Salt Lake City, Utah, on February 21st. Mr. Pope had been a member since 1928.

Walter T. Quigley, of Chicago, Ill., a member since 1926, on March 19th.

Arthur J. Stern, of Brooklyn, N. Y., who joined the Association two years ago, on March 21st.

George B. Webster, of Los Angeles, Cal., on April 15th. Mr. Webster had been a member for the past seventeen years.

Major James A. Willis, Washington, D. C., a member of the Association since 1926, was killed in an airplane accident on March 19th.

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SHALL WE ABOLISH OUR REPUBLICAN FORM OF GOVERNMENT

Failure of Our National Police Power Grant in Case of Eighteenth Amendment Makes More Intensive Consideration of Proposed Child Labor Amendment Imperative—Far Reaching and Unprecedented Powers Granted to Congress by Comprehensive Terms of That Amendment—A Plain Step in the Direction of State Socialism — Statistics Show No Necessity for Such Measure — A Matter for State Regulation—The Duty of the Bar

By Hon. Clarence E. Martin
President of the American Bar Association

WRITING from Paris in September, 1787, to his friend, Monsieur Dumas, one of the French soldiers of our revolution, Thomas Jefferson, then our representative at the Court of Versailles, said: "Our Federal Convention is likely to sit till October; there is a general disposition through the States to adopt what they shall propose and we may be assured their propositions will be wise, as a more capable assembly never sat in America."

And Jefferson's estimate is history's award. For nearly a century and a half we have lived in the light of their wisdom. The Constitution has become a living organism. Admit, if we will, that it was, to a very large extent, a codification of British law and government, coupled with colonial experience for the one hundred and fifty (150) years preceding, as one writer puts it; yet the contrast is too vivid, the departmental coordination but independence is too prominent, to suggest the existence of any desire to copy the British system. The technique of the instrument is strictly American in origin. That it was the result of a series of compromises, is so; for no jury ever tried harder to agree for the good of the Commonwealth.

The tendency of the public mind which produced it was a federalist one, it is true; but that tendency was curbed in the Convention by the adherents of the rights of the States. It is fortunate for the future of the country that the opinions of neither the advocates of a complete centralized government, nor those of a weak, confederated one prevailed. The former would not have been accepted by the States; the latter would have been ineffective. Indeed, it is exact to say that the Constitution was born of necessity, not of choice, and that the exercise of State sovereignty and powers, particularly in the realm of commerce, created a political upheaval, which finally drove the States to form a more perfect union.

The compromises which produced the Constitution, it was hoped, would silence forever the extreme advocates of both schools of political thought. Hardly had the new government been inducted into office than the fight reopened. It has continued ever since.

Strange as it may seem, notwithstanding the real reason for the formation of our Constitution was the regulation of commerce, and even though Gibbons v. Ogden, 9 Wheaton 1, gave Congress exclusive power over interstate commerce, almost one hundred years elapsed before Congress passed the Interstate Commerce Act. And equally remarkable is it, that the "general welfare" clause did not receive judicial construction until 1896.

And to these two clauses can be traced almost all of the so-called social legislation, with which the people have been deluged in recent years. To them, too, may be attributed most of our present day political troubles. Because of them, we have the enlarged federal police power, with the various present day bureaus and the incidental federal extravagance.

When, however, the so-called trend of the times finds the now elastic powers of the national government insufficient, or when Congressional action is taken and judicial concurrence is wanting, constitutional amendment is promptly suggested. A study of these amendments offered at various times is a history of American politics.

For instance the late Senator Hoar, as a member of the House, among many others, offered an amendment in the early nineties requiring postmasters to be elected. During the 67th Congress, when the price of coal was high and labor troubles existent, Mr. Volstead introduced a resolution to submit an amendment regulating the production of and commerce in coal, oil and gas. Amendments have been offered covering every conceivable thought from one granting Congress the power to buy and sell agricultural land, and thus become a real estate broker, to one changing the name of the country. Many of them have sought to limit the right of or take from the Supreme Court the power to pass upon Acts of Congress; some of them proposed to grant the right to the National government to tax state securities; others were designed to give Congress the power to provide an uniform law on marriage and divorce; several would elect the President by popular vote, and one of these is now pending—in all more than four thousand of these amendments have been introduced and the majority of them have pended in recent years. Overwhelming, positive proof, you will concur, that some movement toward destruction of state governmental powers is under way.

In this generation, and in quick succession, the States gave the National government the right to levy direct income taxes; agreed that senators should be elected by popular vote; gave the right of suffrage to women; and agreed to abolish the

legal sale of liquor and gave Congress concurrent power with the States to pass laws to attempt the suppression of the liquor traffic. So successful were these efforts to submit amendments that the Children's Bureau, in Washington, doubtless hoping for an enlargement of its powers, creating a proper atmosphere, sponsored and Congress submitted the Child Labor Amendment. It follows:

"Section 1. The Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

Section 2. The power of the several states is unimpaired by this article, except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

Congress passed the first Federal Child Labor law in 1916, invoking the commerce clause to protect it in the courts. The Supreme Court held (Hammer v. Dagenhart, 247 U. S. 251), that the commerce clause of the Constitution could not be used to compel the states to exercise their police power.

Using its taxing power to sustain it, Congress then passed the Federal Child Labor law of 1917. The Supreme Court (Bailey v. Drexel Furniture Company, 259 U. S. 20) again prevented Congress from usurping the right reserved to the states, and held that the taxing power of the National Government could not be used to secure jurisdiction over the subject, legislation concerning which was clearly within the bounds of state sovereignty. In that case Mr. Chief Justice Taft, among other things, said:

"To give such magic to the word 'tax' would be to break down all constitutional limitations of the powers of Congress and completely wipe out the sovereignty of the states."

Then came the submission of the amendment. Its adoption has been and is now advocated by many well meaning people and organizations. Among the latter is the American Federation of Labor—the most conservative labor organization in the universe. The fact of its submission would seem to justify the inference that there are strong existent reasons for its ratification. When submitted, however, it was rejected by all but six of the States. Lately, nevertheless, it has been revived; and it constitutes an ever present political question, because there is no time limit within which the States can act. During the present winter six of the States, which previously had rejected it, including Arkansas, have reversed their former action and ratified. This means that twelve states have ratified. The people of the states, then, are now engaged in voting upon two amendments, each having a contradictory purpose. One proposes to repeal the Eighteenth Amendment and again give the states complete local supervision over the liquor traffic, and, to this extent, denationalize the government. The other intends to grant to the national government all the power the states possess over child labor, another police power constitutional grant similar to the Eighteenth Amendment.

Urging an amendment to our national organic instrument is a serious matter. Careful, profound, consistent thinking should be done. Admittedly there was a respectable sentiment, strong enough to submit the question of repeal of the Eighteenth Amendment—the first action of its character in our constitutional history. The very act of resubmission constitutes in itself a strong presumption that our outstanding national police power grant was and is a failure. If so, the Child Labor Amendment should have even more intensive consideration.

We thought that the Eighteenth Amendment was the high water mark in state police power direct grants. Yet the powers granted by that amendment are insignificant compared with the powers conferred upon Congress by this so-called Child Labor Amendment.

Let us examine first the necessity for the federal law upon the subject, and then the extent of the power asked to be granted. A comprehensive statement of the facts for the purpose of this discussion is neither possible nor necessary.

According to the 1920 census, the latest statistics available when this amendment was submitted, there were forty millions of people of this country under the age of eighteen. Congress sought the right, then, to legislate for forty millions of persons by this proposed amendment. Of these 12,502,582 were between ten and fifteen years of age, an increase of 15.5 per cent over the 1910 census. The Census Bureau figures in 1920 were based upon the ages of ten to fifteen, and for that reason these ages are taken for illustrative purposes. And the statistics now given include both child employment or "children in gainful occupations," as well as child labor. There is a difference between child employment and child labor. The term "children in gainful occupations," as the term is used by the Census Bureau, between the ages of ten and fifteen, include those who work after school hours, during vacation, on the farm for the parents—in fact all kinds of intermittent work outside of school hours and in other perfectly legal employment. Child labor implies a child of tender years laboring continuously for long hours at tasks beyond its capacity, to its physical or moral detriment.

Of the 12,502,582 above referred to, there were employed in "gainful occupations" 1,060,858, a decrease of 46.7 per cent from 1910. Or to put it another way, there were almost double the number of children working in 1910 than in 1920.

Of the 1,060,858 children, 647,309 were engaged in agricultural pursuits. Of this latter number, 88 per cent were working after school hours or during vacation on the home farm, and 12 per cent worked either for, with or under the direction of their own parents.

Of the 413,549 engaged in non-agricultural pursuits, 364,444 were legitimately employed. There were therefore 49,105 only, less than fifteen, whose employment was a matter of legal concern, and of those 20,513 were newsboys less than fifteen, leaving only 28,592 out of a possible 12,502,582, actually engaged in child labor, or not quite one-fourth of one per cent of all of the children in the country between ten and fifteen, who were employed antagonistic to the terms of the Federal law in force in 1920. Apparently, the amendment, when submitted, intended to take care of the class represented by these 28,592.

We have always been led to believe it was the situation elsewhere that needed attention. For instance, the cotton mill of the south has been held up as the terrible curse of childhood. Yet of the 28,592 above referred to, 404 of this number less

than fourteen, were employed as operatives in North Carolina, South Carolina, Georgia and Alabama, and 218 in all the other states. The other states hear of the terrible child labor condition in West Virginia mines, which condition is non-existent.

In 1930, the number of persons under eighteen increased to approximately forty-five millions. Of these 14,300,576 were between ten and fifteen years of age, an increase of 14.4 per cent. 667,118 were "gainfully occupied," a decrease under 1920 of 37.1 per cent. To put it another way 8.5 per cent of all children in 1920 were "gainfully occupied," while only 4.7 per cent of them were so engaged in 1930.

Of these 667,118 children, 459,497 were engaged in agriculture. Of these over 89 per cent were unpaid, working at different tasks after school hours or during vacation, and less than 11 per cent were known as wage workers. Statistics are not yet available, what percentage of these 11 per cent work on the home farm or for the neighbors during vacation or after school hours.

You will recall that 413,549 were engaged in non-agricultural pursuits in 1920. Despite the increased population this number decreased in 1930 to 197,621. These include caddies, newsboys, water carriers and other like jobs. The number who were not "legitimately" employed, is not yet available. It is fair to presume that the number is less than in 1920.

States properly forbid emp'oyment of children under fourteen, except in agriculture or domestic service, and under sixteen at hazardous occupations. None forbid employment after sixteen, nor at any age in agricultural pursuits or domestic service, consistent with school law. So while we have been debating and discussing this matter, what was once a real has become a phantom problem.

These, then, as briefly as can be stated, are the facts in the case. What rights have the States over children and what is the extent of the grant asked? Are the States so impotent that federal intervention is necessary?

The State may stand *in loco parentis* only in certain peculiar cases, for it is a primary principle that the head of the family has control of and the right to obedience from the child always.

Or, as Blackstone (1 Blackstone 453) puts it:

"The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after."

The State has no jurisdiction over the child merely because it is a child, and no earthly power can delegate such privilege to the State. The Divine law, speaking through the invincible law of nature, prescribed the rights and duties of parent and child centuries before nations were known and governments formulated. Notwithstanding the attacks of diverse character, throughout the centuries, the family is and will remain the fundamental unit of government.

Legal experience has caused us to divide childhood into three ages, one less than seven, one from seven to fourteen, and the other from fourteen to twenty-one. The presumption of a child's knowledge of right and wrong, his right to perform certain legal duties and enjoy certain rights, are all dependent upon his age during infancy. Not only the rights, but the child's duty to its parents, have been fixed in our law for centuries and all legislation must take into consideration these relative rights and duties.

The child's right to sustenance and education is a parental duty. Parents voluntarily accept that duty; ordinarily will not attempt to escape it, and cannot if the law is invoked. If the parent cannot or will not perform his duty, then the State may; but the State cannot assume the right to perform primarily without the consent or the failure of the parent. The State does, however, put certain facilities at the parent's command to lighten his burden and make more efficacious his work. The parent has the undoubted right to train his chi'd, to educate him in the manner he will, and the State may not interfere, if the parent does so, and the minimum standard of parental conduct, which the State requires, is maintained. As Mr. Justice McReynolds aptly remarks (Meyer v. Nebraska, 262 U. S. 390, 67 L. E. 1042, known as the German language case):

"Corresponding to the right of control it is the natural duty of the parent to give to his children education suitable to their station in life; and nearly all states, including Nebraska, enforce this obligation by compulsory law."

And again:

"That the state may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear, but the individual has certain fundamental rights which must be respected."

The State, then, does not have the right to disturb "fundamental rights." These are fixed by the natural law. So-called labor statutes are upheld upon the ground of public morale, mental development, or physical safety. They are, however, exclusively "employment" statutes. It may be urged that statutes preventing the employment of children under a certain age in labor are in derogation of the common law. Rather however, are they to be regarded as in aid of the common law; because it is the natural duty of the parent to protect the child's health and morals. But no State has gone beyond the limits of reason in applying the rule, else parental rights would be disturbed. This amendment, by giving Congress the right to limit, regulate or prohibit labor, as opposed to "emp.oyment," of persons under eighteen, intends to confer upon that body a right that the States do not now possess, and actually seeks, by the legislation that may be passed in pursuance of it, to vitiate the reasoning of Meyer v. Nebraska and attempt to set aside the natural law. Its provisions plainly substitute Congress for the parents, for Congress, under it, may exercise right over the child, from the time of birth forward.

Whatever reasons exist for its submission, the only excuse given in the debate in the Senate, was that Congress had twice legislated upon this question, and there must exist the incontrovertible presumption that the people felt the need of national legislation upon this subject or their representatives in Congress wou'd not have voted for it. Therefore Congress should have the power to legislate upon the prohibited subject and the States should surrender it.

This argument could be made by any justice of the peace, who might insist that because several suitors had brought suits before him beyond his

jurisdiction, the public generally intended to give him such power; therefore he should have it.

Why this proposed amendment fixes the limit of regulation to eighteen years, in view of present progressive state statutes and former federal legislation is not, at once, obvious. There is no existing sentiment in favor of such an age; high school graduates are usually younger; the average country boy has taken his place in the sphere of usefulness before that age. One can conjecture. The federal government will then have the power to limit, regulate or prevent young men, otherwise capable, from working when the labor market is low. In other words, youthful initiative can be stifled when any organization powerful enough to exert that influence, demands such congressional action.

Observation was made that the amendment uses the word "labor" and not "employment." Under it Congress can limit, regulate or prohibit not alone "employment" but all kinds of "labor," for the latter is a more comprehensive term and embodies the act done, whether employed or not. Unlike the state laws, this amendment applies to agricultural and domestic services, as well as all other labor.

By the exercise of the power to prohibit, Congress can prevent any person from performing the slightest task until he is eighteen, and Congress can exercise the incidental right to support those who are not permitted to support themselves. Thus, it can be made an incentive to idleness.

Nor is the power to limit any the less comprehensive. Statutes can be passed under its provisions limiting the young men's activities within certain designated and limited bounds. In this manner he may be kept out of the labor market. He may be allowed to work at home for the parents, but prevented from becoming a wage earner elsewhere.

Broad as each of the powers to limit or prohibit is, the right to "regulate" is broader. Let me recall that the word "regulate," and only that word, occurs in the commerce clause. It has been judicially interpreted. We know then with certainty what power the states are asked to grant to the federal government, when we give the privilege to some bureaucratic power to "regulate" the labor, not employment, of our children.

In Mondon v. N. Y., N. H. & H. Railroad Co., (Second Employers' Liability Cases), 223 U. S. 1, 56 L. E. 327, Mr. Justice Van Devanter, speaking for an unanimous Court, interpreted the word "regulate" in the commerce clause, which is used in the same sense here, to mean the power "to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large."

And Mr. Chief Justice Hughes in Texas & N. O. Railroad Company v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548, 74 L. E. 1034, decided in 1930, declared for an unanimous Court, that "the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement, and to adopt measures to promote its growth and insure its self."

"To regulate," then means the power "to foster, protect, control and restrain," as well as "to enact all appropriate legislation for the protection and advancement" of child labor. But court decisions are unnecessary—the very language is sufficient; common sense dictates that the effort is being made to give a power over children to the federal government, which it does not now possess, and, therefore, cannot exercise.

Unquestionably this language would give Congress the power to prescribe the character, methods and hours of labor, the minimum wage, in what seasons the seventeen-year-old boy may work, what are proper working conditions, whether the labor of the youth is dependent upon the labor of older persons and the number of hours contributed by adults on the same class of work. In this manner the character and length of labor of adults, as well as children, may be regulated, if youths under seventeen are employed at the same place with adults.

Congress, of course, will be the judge of the extent of such regulation. As an incident to its power, education and educational methods can be nationalized. Compulsory education and its standards, required military training, or any incidental power that a future Congress may conceive to be essential in the regulation of the power come within its scope. So comprehensive are its terms that one cannot imagine, under the incidental powers of Congress, any exertion of any person under eighteen that the federal government cannot control, if Congress so declares. Indeed a Senator in the debate, when submitted, sagely remarked that the law of Moses was being amended to read "Honor thy father and thy mother, as the Great Father in Washington dictates."

If challenged, the Supreme Court, following its precedents, must decide that given the power to legislate, the manner and form in which the prerogative is exercised, within the power conferred, is that of Congress, and, being legislative, cannot be judicially challenged. (See Massachusetts v. Mellon, 262 U. S. 447, 67 L. E. 1078).

It may be urged that Congress will not have these powers—that the reference is to labor alone and not to other incidental matters. There arises before me, as a spectre in the night, the great implied power clause of the Constitution (clause 18, section 8, article 1), which gives to Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly conferred. The Tenth Amendment does not use the word "expressly" in reserving powers not granted. It is a fundamental principle of constitutional construction, as we all know, that what is implied is as much a part of the instrument as what is expressed. (In re Jasper Yarbrough, et al., 110 U. S. 651, 21 L. E. 274).

I can sense the workings of your minds—that the subject has been overdrawn in this discussion; that Congress, even though it has the power, will not so act. Probably it will not do so all at once, nor entirely at any one time. But the right is clear. We just observed that it took Congress one hundred years to fully grasp its rights under the commerce clause; now the most important enactments are passed under its grant. Let me give you another answer. The Children's Bureau in 1924, seriously advocated a law providing for compulsory registration of pregnancy, through local health offices. (Standards of Child Welfare, Children's Bureau Publication No. 60, page 146.) Recalling the wire tapping and automobile searching decisions under the Eighteenth Amendment, does anyone

here doubt the power of Congress, which will have jurisdiction over the physical and mental exertions from the time of birth forward, to enact such a law, if this amendment is ratified?

What is meant by the language of the second clause is open to honest difference. Is it a concurrent clause or is it declaratory of what we now know the law to be—that until Congress acts the power of the States is paramount? We know that the right of Congress, once exercised, is exclusive, and its treatment of the subject is supreme. And how far shall the State law be superseded? If to a limited extent, then plainly the amendment permits double appropriations and double the number of office holders, if not double jeopardy. Remember, p'ease, that the States, in theory, are still sovereign within their sphere of action.

If Congress does not intend to use them, why ask the grant of such powers? And why grant them? Does any necessity exist for their exercise?

Proponents will say that four reasons exist for this grant of power. First, the lack of adequate legislation, and adequate enforcement on the part of some of the States. Nearly all of the states have proper legislation covering the ages generally recognized as subjects of protection. There is no charge that the State laws are not enforced. Second, the want of uniformity. Every household treats its problems in its own manner. So also the States. It is an element of sovereignty. Might we not also urge federal assumption of enforcement of the entire body of the criminal law, because various crimes are defined and punished in various ways in different portions of the country. Third, that our present theoretical form of government was an excellent one for a rural and undeveloped state of society through which we have successfully passed, and there must be not only uniformity but enlargement of the social functions of government. This is the argument of economists, sociologists and some law professors, who mistake state socialism for social justice. Fourth, the efficiency of the central government over that of the states and the assumption of the cost of enforcement by the National Government. The federal establishment has proved itself completely inefficient to enforce what are, in reality, local police regulations. Assumption of cost has been and is a political delusion.

It was charged in the debate in the Senate that this was a Bolshevik effort to nationalize our children. Senator King, of Utah, in the debate, stated that, while in Moscow the year previous, when he criticized child nationalization by the Communist Government, he was told that the socialists of this country were back of the movement here, that our Constitution would be amended, and that the Federal Government would soon be doing just what the Bolshevik Government is doing in Russia.

Whatever arguments may be made, by its defenders, the labor condition of youths of seventeen do not have to be regulated or prohibited by governmental action. It is too broad, too indefinite, too general, in the face of principles of well known construction to suggest otherwise. There must be ulterior reasons. There are.

This proposed grant is not a proposed child employment amendment. It is not so intended. It is a socialistic measure. It is an ingenuous attempt to nationalize children, making them responsible to the National Government instead of to their parents. It strikes a blow at the home. It takes from the States whatever rights they possess relative to the matter and its coordinate subjects.

The proposers of it are taking advantage of the federalizing tendency to authorize the enactment of socialistic laws. It is time to call a halt. If any State has a child labor problem at home, let it be solved there. Every legislature which ratifies it admits that it is incompetent to handle a matter completely and entirely within its realm. It is unfair, un-American, to pass it on to the national sphere, where it does not belong. The national establishment now has more than it can do; it is overloaded. Sentimental emotionalism must not be substituted for the realm of reason. The real intent of the amendment is opposed to the ideals of our American institutions. It should be again relegated to the storehouse of political blunders and a perpetual timelock placed on the door.

Moreover its adoption is but a step in the destruction of our republican form of government and the substitution of a social democracy. Adopt it and other amendments, nationalizing and socializing our governmental structure, will follow. And their adoption will be, more or less, a matter of form. Given jurisdiction of the activities of children, certainly the national government should have the regulation of marriage and divorce. In its train comes the settlement of personal and property rights. If these, why not the other domestic relations?

Are we prepared to sponsor this character of change in our government? Shall we meet the issue now and prevent it from taking further tangible form?

"The people of every state must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves." The American people, heterogeneous though they be, are deeply and intensely imbued with a spirit of loyalty to their respective states and to the Republic. Undoubtedly this method of destruction has not become thoroughly manifest to them. I predict many members of Congress have not completely sensed it. We must maintain intact that fundamental structure which has been responsible for our tranquility at home and greatness abroad.

Amid the vicissitudes and fortunes of our political life for a century and a half, members of the bar have been the leaders of constructive thought and action in the Nation. There should be, then, an individual sense of responsibility on the part of each of us and a stern determination to stem this tide of destruction. The fight is ours. A recognition of compelling duty urges us to sound the note of warning. If our Republic of today disintegrates into a social democracy tomorrow, it will be our fault; it can be none other.

I choose to believe that success will crown our efforts; that the people will not abandon the structure the Fathers reared; that the concentrating tendencies of today will be checked; that we shall hand down to posterity a government "upon which the world may gaze, in admiration forever."

THE NATIONAL INDUSTRIAL RECOVERY ACT

Consideration of Statute in the Light of Its Legal Background and Effects and in Terms of Its Constitutionality—Statute Summarized—Changes in the Anti-Trust Laws—Doctrine of Emergency—Commerce Clause—Due Process of Law—Licensing Provisions—Pre-existing Contracts—Conclusion

By Milton Handler

Assistant Professor of Law at Columbia University; Member of New York Bar

An article upon the National Industry Recovery Act during the initial stages of its administration is more the task of a journalist than of a lawyer. The subject matter is ever-changing and there are new developments to be reported daily. In the press and on the platform, the economic presuppositions and implications of the law as well as its social effects have been widely debated. Numerous analyses and explanations of the measure have appeared. Meetings of trade groups have been held throughout the land to discuss the bill and to formulate codes. The machinery for the inauguration of the revolutionary changes in business organization, which the bill contemplates, is rapidly being set up. As the discussion proceeds apace and as the kaleidoscopic developments continue, it becomes increasingly evident that definitive appraisal of the law and its administration must be postponed. The time is near for a moratorium upon popular explanations and prophetic judgments. In this paper the writer accordingly restricts himself to a discussion of the technical aspects of the law. It is proposed to consider the statute in light of its legal background and effects and in terms of its constitutionality.

The Statute Summarized[1]

The objectives of the law are set forth in the first section. After asserting the existence of a national emergency which has caused widespread unemployment and has resulted in the disorganization of industry and the undermining of the standards of living of the American people, the policy of Congress is declared to be as follows:

1. To remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof.
2. To provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups.
3. To induce and maintain united action of labor and management under adequate governmental sanctions and supervision.
4. To eliminate unfair competitive practices.
5. To promote the fullest possible utilization of the present productive capacity of industries.
6. To avoid undue restriction of production (except as may be temporarily required).
7. To increase the consumption of industrial and agricultural products by increasing purchasing power.
8. To reduce and relieve unemployment.
9. To improve standards of labor.
10. To rehabilitate industry.
11. To conserve natural resources.

In the attainment of these objectives, provision is made for the submission to the President, by trade or industrial associations or groups, of codes of fair competition governing the conduct of business in the trades represented by the applicants. The code when approved by the President becomes the legal standard of competition for the trade or industry. Thereafter, a violation of any provision of the code is deemed a misdemeanor, punishable by a fine of not more than $500, each day the violation continues being regarded as a separate offense. The codes, moreover, are to be enforced by the Federal Trade Commission by the issuance of cease and desist orders and by the several district attorneys by proceedings in equity to restrain any violation.

Before the President approves of any code, he must be satisfied

1. that the code will tend to effectuate the policy of the statute;
2. that the code is not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them;
3. that the code does not permit monopolies or monopolistic practices;[1a]
4. that the associations or groups submitting the codes are truly representative of the trades or industries which are affected thereby and that no inequitable restrictions on admission to membership are being imposed.

The right to be heard must be afforded any person "engaged in other steps of the economic process" whose services and welfare are affected by any proposed code.

Each code must contain several basic labor provisions. The right of employees to organize and bargain collectively through representatives of their own choosing and to be free from the interference of employers in the selection of their representatives must be recognized. The code must specify that no employee and no person seeking employment shall be required as a condition of employment to join a company union or to refrain from joining, organizing or assisting a labor organization of his choosing. There must also be compliance with the maximum hours of labor, minimum rates of pay and other conditions of employment

1. Public—No. 67—73d Congress, approved June 16, 1933.

1a. As the Act is worded, regardless of whether the President finds that the codes satisfy condition 2 in the text, condition 3 still applies apart from any finding by the President.

which are approved or prescribed by the President.

So far as practicable, the President must afford employers and labor an opportunity to establish by mutual agreement the labor standards for the trade. Such standards when approved are binding upon the industry. In the absence of an approved mutual agreement, the President, after investigation, may prescribe and establish as a limited code of fair competition the maximum hours of labor, the minimum rates of pay and other conditions of employment necessary to effectuate the purposes of the law.

The law thus calls for self-regulation by business. Industry may prepare in the first instance its own code and establish by mutual agreement with labor the standards of employment, which are then to be submitted for the President's approval. If no code is submitted, the President, upon his own motion, or if complaint is made to him that abuses inimical to the public interest or contrary to the policy of the statute are prevalent in any trade, may establish, after investigation and hearing, a code of fair competition for the trade which shall have the force and effect of law. Similarly, as already indicated, where labor and capital cannot agree as to proposed labor standards, the President may himself establish such standards for the industry.

To accomplish the purposes of the act and for a period of one year, the President is given a broad licensing power. He may, upon discovering that destructive wage slashing or price cutting or other activities contrary to the policy of the statute are being practiced in any trade, require that those engaged in business affecting interstate or foreign commerce obtain a license to engage in the trade upon such conditions as he shall prescribe. Any person carrying on business without a license or in violation of its terms is guilty of a misdemeanor punishable by a fine of not more than $500 or imprisonment not exceeding six months. Each day a violation continues constitutes a separate offense.

The codes presumably relate to practices affecting an entire trade. A different method of treatment is provided for the problems of smaller groups constituting but part of an industry. Agreements between members of any trade or labor organization may be submitted to the President for his approval or may be made directly with him. Such agreements must aid in effectuating the policy of the statute and must not be designed to promote monopolies, or to eliminate or oppress small enterprises, or operate to discriminate against them.

The President is given broad rule making powers and infringement of any rule or regulation promulgated by him is made a criminal offense punishable by fine and imprisonment. He may cancel or modify any code, agreement, or license approved or issued under the Act. The benefits of the statute cannot be obtained by any trade or group which fails to provide the President with such information as he may require. The Federal Trade Commission is authorized to conduct investigations at his request.[2]

The duration of the statute is limited to two years or less, should the emergency cease. While the law is in effect and for 60 days thereafter, every code, agreement or license approved, prescribed or issued, and action complying therewith, are exempted from the provisions of the anti-trust laws. There are provisions affecting foreign commerce and the regulation of the oil industry which are summarized in the margin.[2a]

The administration of the statute is entrusted to such agencies as the President may create. The plan of organization which has been adopted is quite ingenious. The details of administration are in the hands of an Administrator and his staff of deputies and experts. Advising the administrators are three boards consisting of representatives of industry, labor and the consuming public. Ultimate authority rests with the President and the National Industrial Recovery Board, consisting of a committee of the Cabinet, the Chairman of the Federal Trade Commission and the Director of the Budget.

Changes in the Anti-Trust Laws

Of primary interest is the change which the statute is assumed to have wrought in the anti-trust laws. The Act has been hailed as a charter of liberty by those who have regarded themselves shackled by the restrictions of the Sherman law. Does the wording of the new law justify these high hopes?

The anti-trust laws cover a large field. They relate not merely to the collective activities of independent tradesmen but to the consolidation and merging of industrial companies, the monopolistic practices of industry, the administrative regulation of competitive practices and the acts of labor unions.

The prohibition against the creation of a monopoly by mergers and consolidations is in no way relaxed. Section three specifically provides that monopolies shall not be permitted. In truth, there was, of course, no need for any relaxation.[3] The rules regarding monopoly laid down in Standard Oil Co. of N. J. v. U. S.,[4] Northern Securities Co. v. U. S.,[5] U. S. v. Union Pacific R. R. Co.,[6] U. S. v. U. S. Steel Corp.,[7] U. S. v. Reading Co.,[8] and the prohibition in section 7 of the Clayton Act[9] against holding companies and intercorporate stock holding are thus unaffected by the Recovery Act.

The term "monopolistic practice" is of indefinite and expanding content. A great variety of such practices are forbidden by the anti-trust laws, and have been enjoined at the suit of the govern-

2. The draftsmen have not entirely avoided the difficulties that have impeded investigations by the Commission. See the writer's article on the Constitutionality of Investigations by the Federal Trade Commission (1928) 28 Columbia L. R. 708, 905; Watkins, An Appraisal of the Work of the F. T. C. (1932) 32 Columbia L. R. 272.

2a. Entry of foreign made goods may be permitted upon such terms and conditions and subject to the payment of such fees and to such limitations upon the quantities imported as the President may prescribe and licenses may be required of importers. That Congress has the power to impose such conditions, see The Abby Dodge, 223 U. S. 166, 176, 32 Sup. Ct. 310 (1912); U. S. v. The William, 2 Hall. L. J. 255, 28 Fed. Cas. 614, 620-621 (1808); Buttfield v. Stranahan, 192 U. S. 470, 492-493, 24 Sup. Ct. 349 (1904); Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 334-335, 29 Sup. Ct. 671 (1909); and dissent of Fuller, C. J., in Champion v. Ames, 188 U. S. 321, 364, 373, 23 Sup. Ct. 321 (1903); Dodd, Cases on Constitutional Law (1932) 650, 651. This casebook contains much valuable information relating to the matters herein considered.

The oil section vests authority in the President to regulate pipe lines, to divorce pipe lines from holding company control, and to prohibit transportation in commerce of petroleum produced or withdrawn from storage in violation of state law. On the problems of the oil industry, see Marshal & Meyers, Legal Planning of Petroleum Production (1931) 41 Yale L. J. 23; Two Years of Proration (1933) 42 Yale L. J. 702; Ford, Controlling the Production of Oil (1932) 30 Mich. L. R. 1170; Stocking, The Oil Industry and the Competitive System (1925).

3. See the writer's articles on Industrial Mergers and the Anti-Trust Laws (1932) 32 Columbia L. R. 179; The Legal Aspects of Industrial Mergers in Handler, The Federal Anti-Trust Laws—A Symposium (1932) 173.

4. 221 U. S. 1, 31 Sup. Ct. 502 (1910).

5. 193 U. S. 197, 24 Sup. Ct. 436 (1904).

6. 226 U. S. 61, 33 Sup. Ct. 53 (1912).

7. 251 U. S. 417, 40 Sup. Ct. 293 (1920).

8. 253 U. S. 26, 40 Sup. Ct. 425 (1920).

9. See Irvine, The Uncertainties of Section 7 of the Clayton Act (1928) 14 Corn. L. Q. 28.

ment or made the basis of private action under sections 7 of the Sherman Act or 4 of the Clayton Act. The following are fair examples: Bogus independents,[10] fighting ships,[11] fighting brands,[12] local price cutting,[13] temporary competition to drive rivals out of business,[14] molestation and intimidation,[15] refusal on part of monopoly to deal,[16] boycotts,[17] inducing breach of contract,[18] corners,[19] espionage, enticement of employees, defamation of competitors and disparagement of their goods, institution of groundless suits for patent infringement, and malicious threats of such suits.[20]

Whatever meaning may be ascribed ultimately by the courts to the terms "monopolistic practice" as used in the Recovery Law, it is certain that the acts enumerated above remain unlawful, regardless of whether their indulgence is permitted, directly or indirectly, in any code approved by the President. Such approval would not be warranted by the statute. By the same token, the provisions of the Clayton Act regarding price discrimination[21] and exclusive dealing arrangements and tying agreements[22] remain intact.

The extensive jurisdiction of the Federal Trade Commission is untouched by the new law.[23] The statute specifically provides that "nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended."

Labor combinations have been subject to frequent attack under the anti-trust laws. Strikes for what have been deemed wrongful purposes,[24] nonpeaceful picketing,[25] boycotts,[26] interference with production[27] or with contract relations,[28] inducement of breach of yellow dog contracts,[29] refusal to work on non-union goods,[30] direct interference with transportation,[31] reciprocal boycott agreements with employers[32] and combinations with employers to restrict production[33] have all been held unlawful wherever interstate commerce was directly affected.[34] In view of the enlightened labor provisions of the new law and the express provision suspending the anti-trust laws, is it to be assumed that the stigma of illegality has been removed from these practices? First to be considered is the effect of the Norris-La Guardia Anti-Injunction Act.[35] The changes in substantive law effected by that statute are far from clear.[35a] So far as the Recovery Act is concerned, the exemption from the anti-trust laws can only be obtained by the inclusion of a practice in a code approved by the President. Does the new law give the administration the power to embody the practices enumerated above in the codes which are approved or prescribed? The statute recognizes the right of collective bargaining; it contains no reference to strikes, boycotts or inducements of breach of contract. The labor sections of the statute probably remove the causes of labor disputes, but they hardly transform what have hitherto been unlawful conspiracies into "acts of fair competition." Since every code must contain a provision outlawing the yellow dog contract and in view of the provisions of the Norris-La Guardia Anti-Injunction Act, there is little danger of another Hitchman decision.[36] Whether employers and employees may combine to limit production

10. Monarch Tobacco Works v. American Tobacco Co., 165 Fed. 774 (C. C. W. D. Ky. 1908); U. S. v. International Harvester Co., 214 Fed. 987, 992 (D. Minn. 1914).

11. U. S. v. Hamburgh-American S.S. Line, 216 Fed. 971, 973 (S. D. N. Y. 1914), reversed on other grounds, 239 U. S. 466, 36 Sup. Ct. 212 (1916); cf. Thomsen v. Cayser, 243 U. S. 66, 37 Sup. Ct. 353 (1917); see 39 Stat. 733 (1916), 46 U. S. C. A. § 812.

12. U. S. v. American Thread Co. (consent decree).

13. Story Parchment Co. v. Patterson P. Paper Co., 282 U. S. 555, 51 Sup. Ct. 248 (1931); Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F (2d) 234 (C. C. A. 2d, 1929), cert. den. 279 U. S. 858, 49 Sup. Ct. 353 (1929); Standard Oil Co. of N. J. v. U. S., 221 U. S. 1, 31 Sup. Ct. 502 (1911).

14. Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946 (1909); Dunshee v. Standard Oil Co., 152 Ia. 618, 132 N. W. 371 (1911); 165 Ia. 625, 146 N. W. 830 (1914); Boggs v. Duncan-Scheli Furniture Co., 163 Ia. 106, 143 N. W. 482 (1913); cf. U. S. v. Central West Publishing Co. (consent decree).

15. Evenson v. Spaulding, 150 Fed. 517 (C. C. A. 9th, 1907); Tarleton v. McGawley, Peakes' N. P. 270 (1794); Gilly v. Hirsh, 122 La. 966, 48 So. 422 (1909).

16. Eastman Kodak Co. v. So. Photo Materials Co., 273 U. S. 359, 47 Sup. Ct. 400 (1927).

17. Binderup v. Pathe Exchange, 263 U. S. 291, 44 Sup. Ct. 96 (1923); Eastern States Lumber Assn. v. U. S. 234 U. S. 600, 34 Sup. Ct. 951 (1914); Ramsay v. Associated Bill Posters, 260 U. S. 501, 43 Sup. Ct. 167 (1923); Paramount Famous Lasky Corp. v. U. S., 282 U. S. 30, 51 Sup. Ct. 42 (1930); U. S. v. First Nat. Pictures, 282 U. S. 44, 51 Sup. Ct. 45 (1930). The statute specifically forbids codes which eliminate or oppress small enterprises or operate to discriminate against them.

18. Ballard Oil Terminal Corp. v. Mexican Petroleum Corp. 28 F. (2d) 91 (C. C. A. 1st, 1928); Patterson v. U. S., 222 Fed. 599, 650 (C. C. A. 6th, 1915); Sayre, Inducing Breach of Contract (1923) 36 Harv. L. Rev. 663; Carpenter, Interference with Contract Relations (1928) 41 Harv. L. Rev. 728.

19. Hood Rubber Co. v. U. S. Rubber Co., 229 Fed. 583 (D. Mass. 1916); U. S. v. Patten, 226 U. S. 525, 33 Sup. Ct. 141 (1913).

20. For a collection of authorities, see Davies, Trust Laws and Unfair Competition (1916). See also, (1929) 38 Yale L. J. 503; (1930) 39 Yale L. J. 1035; (1932) 32 Columbia L. R. 335; (1932) 32 Columbia L. R. 291.

21. George Van Camp & Sons Co. v. American Can Co., 278 U. S. 245, 49 Sup. Ct. 112 (1929); Ladoga Canning Co. v. American Can Co., 44 F. (2d) 763 (C. C. A. 7th, 1930), cert. den. 282 U. S. 899, 51 Sup. Ct. 183 (1931); McAllister, Sales Policies and Price Discrimination under the Clayton Act (1932) 41 Yale L. J. 518; (1924) 38 Harv. L. R. 103; (1929) 38 Yale L. J. 804.

22. Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 42 Sup. Ct. 360 (1922).

23. For a list of the methods of competition which the Commission deems unfair, see Annual Report of the Federal Trade Commission, (1932) 86-90. For an analysis and collection of the court cases, see the writer's article on The Jurisdiction of the Federal Trade Commission over False Advertising (1931) 31 Columbia L. R. 527, 553.

24. Columbus Heating and Ventilating Co. v. Pittsburgh Building Trades Council, 17 F. (2d) 806 (W. D. Pa. 1927); cf. Alco-Zander Co. v. Amalgamated Clothing Workers, 35 F. (3d) 203 (E. D. Pa. 1929).

25. Cf. Amer. Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 42 Sup. Ct. 72 (1921).

26. Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1908); Duplex Printing Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 172 (1921); Oakes, Organized Labor and Industrial Conflicts (1927) § 443.

27. Coronado Coal Co. v. U. M. W., 268 U. S. 295, 45 Sup. Ct. 551 (1925); Witte, The Government in Labor Disputes (1932) 73.

28. Hitchman Coal and Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 (1917); International Organization v. Red Jacket C. C. & C. Co., 18 F. (2d) 839 (C. C. A. 4th, 1927), cert. den., 275 U. S. 536, 48 Sup. Ct. 31 (1927); Sayre, Inducing Breach of Contract (1923) 36 Harv. L. R. 663, 690.

29. See cases cited in Note 28.

30. Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association, 274 U. S. 37, 47 Sup. Ct. 522 (1927).

31. Cf. United States v. Workingmen's Amalgamated Council, 54 Fed. 994 (C. C. La. 1893), aff'd, 57 Fed. 85 (C. C. A. 5th, 1893); United States v. Debs, 64 Fed. 724 (C. C. Ill. 1894), aff'd on other grounds, 158 U. S. 564, 15 Sup. Ct. 900 (1895); O'Brien v. United States, 290 Fed. 185 (C. C. A. 6th, 1923). But cf. Northern Ry. Co. v. Int'l Association of Machinists, 283 Fed. 557 (D. Mont. 1922).

32. United States v. Brims, 272 U. S. 542, 47 Sup. Ct. 169 (1926); Boyle v. United States, 259 Fed. 803 (C. C. A. 7th, 1919); Belfi v. United States, 259 Fed. 822 (C. C. A. 3d, 1919). But cf. National Association of Window Glass Manufacturers v. United States, 263 U. S. 403, 44 Sup. Ct. 148 (1923); Watkins, Industrial Combinations and Public Policy (1927) 258.

33. Compare cases cited in Note 32.

34. See Berman, Labor and the Sherman Act (1930) 197 et seq. Cf. Levering & Garrigues Co. v. Morrin, 53 Sup. Ct. 549 (1933); Coronado Coal Co. v. U. M. W., 259 U. S. 344, 42 Sup. Ct. 570 (1922); United Leather Workers International Union v. Herkert, 265 U. S. 457, 44 Sup. Ct. 623 (1924).

35. 47 Stat. 70 (1932), 29 U. S. C. A. § 101 et seq. (Supp. 1932), discussed in Frankfurter and Greene, Congressional Power over the Labor Injunction (1931) 31 Columbia L. R. 385; Christ, Federal Anti-Injunction Bill (1932) 26 Ill. L. R. 515; Witte, Federal Anti-Injunction Act (1932) 16 Minn. L. R. 638; Doskow, Statutes Outlawing Yellow Dog Contracts (1931) 17 A. B. A. J. 516. See also the labor provisions in the recent bankruptcy amendments, § 77 (o) (p) (q), H. R. 14359, 72d Cong. 2d Sess., discussed in Rodgers and Groom, Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act (1933) 33 Columbia L. R. 571, 578; Note (1933) 33 Columbia L. R. 882.

35a. The language of Section 4 of the Anti-Injunction Bill is similar to that of the Clayton Act. Whether it will fare better in the courts than the latter measure is a matter of conjecture. That changes in substantive law were intended is clear. But the intentions of the draftsmen are not well revealed and it is difficult to predict in many instances which of the prohibited practices have been made lawful. See the penetrating criticism of Christ, supra, note 35. The text is concerned with the inclusion in codes of practices which are not legalized by the Norris measure.

36. Hitchman Coal and Coke Co. v. Mitchell, supra note 28, (restraining interference with yellow dog contracts) discussed in Cook, Privileges of Labor Unions in the Struggle for Life (1918) 27 Yale L. J. 779; Carey and Oliphant, The present Status of the Hitchman Case (1929) 29 Columbia L. R. 441.

will depend upon whether the bill allows production control by industry, a question which will be discussed subsequently.

It is in the field of collective action by trade groups that the new law is destined to have its chief effect. The more recent decisions of the Supreme Court afforded a wide latitude for trade cooperation.[37] But price fixing, limitation of production, division of territories, apportionment of business and allotment of customers, pooling arrangements, boycotts and the suppression of competition remained unlawful.[38] Businessmen were able to develop little enthusiasm for the interchange of trade statistics, cost accounting, credit bureaus, standardization of products, interchange of patent licenses, commercial arbitration, and the regulation of trade relations which the law allowed,[39] regardless of their economic value. What they sought primarily was the ability to control prices and production. Trade associations have not been prospering in recent years. Membership has been difficult to attract in view of the restrictions of the anti-trust laws and the fear of criminal penalty. The inability of associations to discipline effectively recalcitrant members deprived them of power and influence.[40] The self-imposed limitations of such groups redounded to the benefit of non-members and in fact, made members more vulnerable to the snipings of outsiders. The abrupt change in the attitude of the Supreme Court in the Appalachian case[41] offered an avenue of escape from the law's rigors but did not solve the problems of trade groups.

The Recovery Act with its powerful sanctions provides associations with the necessary power to discipline minorities. The codes are binding upon the entire trade. The sword of Damocles is shifted from over the heads of association members to those of the recalcitrant minorities. Before it was a crime to participate in some collective efforts, now it is a crime not to cooperate.

But has the limited suspension of the anti-trust laws given industry that for which it has clamored? Has the President the authority under the Act to permit price fixing? He may, as we have seen, approve of such codes as effectuate the policy of the Act. Does price fixing remove obstructions to interstate commerce? Does it provide for the general welfare by promoting the organization of industry for the purpose of cooperative action? Does it eliminate unfair competitive practices? Does it promote the fullest utilization of the present productive capacity of industries? Does it avoid undue restriction of production? Does it increase purchasing power, reduce unemployment, improve standards of labor, rehabilitate industry or conserve natural resources? Is price-fixing a monopolistic practice? If every member of an industry adheres to an agreed price, has a monopoly been established?

Many of these queries involve questions of fact as well as of law. It might be contended that the President's determination of whether a practice effectuates the purpose of the statute is conclusive and not subject to judicial review. Under this view the President's powers would be virtually limitless. Moreover, section 1 purports to establish a legal standard. The scope of judicial review will be one of the first questions to be determined by the courts. The answer to the last two questions as a matter of statutory construction is far from clear.[42] There are cases holding price fixing a monopoly practice.[43] The power to fix a non-competitive price has sometimes been adopted as the test of monopoly.[44] Moreover the Trade Commission, whose powers are left unimpaired, has proceeded successfully against price fixing.[45]

Turning to the debates, we find a difference of view in Congress. Senator Borah vigorously opposed the legislation on the theory that it permitted price control by industry[46] and offered an amendment, which was adopted by the Senate, reading as follows:

"Provided such code or codes shall not permit combinations in restraint of trade, price fixing, or other monopolistic practices."[47]

In conference, the provision was changed to read:

"Provided such code or codes shall not permit monopolies or monopolistic practices."[48]

Senator Borah in a sharp attack upon the conferees contended that the change had validated price fixing.[49] Senator Wagner explained the purpose of the change.[50] It was not the intention of the conferees, he argued, to permit monopolistic price fixing. The bill, he thought, was explicit on that score. But the terms "restraint of trade" and "price-fixing," he felt, were broader than monopoly and as construed by the courts, included not merely objectionable price fixing but concerted action to fix minimum wages, to prevent sales below cost, and trade agreements which affected prices such as arrangements regarding credits, discounts, cut-throat competition, interchange of statistical information and the like. The change in the Borah amendment was not designed to legalize direct price fixing but to permit the formulation of such price policies as are consistent with the major purposes of the bill. Senator Borah was not satisfied with this explanation and persisted in his view that the statute allows direct price fixing.[51]

The determination of the question was thus left by Congress to the courts. There should be little difficulty with the price fixing which is already permitted by the Appalachian case and the price policies enumerated by Senator Wagner. It seems also clear that the fixing of unreasonable prices will be condemned. But whether the establishment by an entire industry of a reasonable but

37. Maple Flooring Mfgrs. Assn. v. U. S., 268 U. S. 563, 45 Sup. Ct. 578 (1925); Cement Mfgrs. Assn. v. U. S., 268 U. S. 588, 45 Sup. Ct. 592 (1925); Standard Oil Co. v. U. S., 282 U. S. 163, 51 Sup. Ct. 421 (1931); Appalachian Coals Inc. v. U. S., 288 U. S. 344, 53 Sup. Ct. 471 (1933).

38. For the cases, see (1932) 32 Columbia L. R. 291.

39. See the writer's article, The Anti-Trust Laws and the Public Interest, (1932) 18 American Bar Assn. Journal 625. See also Kirsh, The National Industrial Recovery Act (1933) Ch. III.

40. See (1932) 32 Columbia L. R. 313.

41. Supra note 37, upholding the marketing of the production of a substantial part of the coal industry through a common sales agency.

42. The standards of legality are expressed in political rather than legal terms. To give definite content to such vague language is to legislate, not construe. While the Act is not clear, it probably is not essential for a code provision to satisfy all the purposes enumerated in section 1. But what is to be done where a provision tends to accomplish one purpose and to nullify another?

43. U. S. v. Trenton Potteries, 273 U. S. 392, 47 Sup. Ct. 377 (1927); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, 27 Sup. Ct. 65 (1906); Thomsen v. Cayser, 243 U. S. 66, 37 Sup. Ct. 353 (1917); U. S. Tobacco Co. v. American Tobacco Co., 168 Fed. 701 (C. C. N. Y. 1908).

44. 32 Columbia L. R. 179, 256.

45. Federal Trade Commission v. Pac. States Paper Trade Assn., 273 U. S. 52, 47 Sup. Ct. 255 (1927).

46. 77 Cong. Rec. 5264 et seq. (1933).

47. Ibid, 5382.

48. Ibid, 5933.

49. Ibid et seq. 5933, 5939, et seq.

50. Ibid 5939. See also, 5265, 5273, 5279, 5280.

51. Ibid 5939 et seq.

non-competitive price will, as a matter of statutory construction, be upheld is an open question.[52]

The Act, it has frequently been said, is directed against uneconomic price cutting. Price discrimination and predatory price cutting, it will be remembered, are condemned by existing law. The legality of an agreement not to sell below cost was never authoritatively determined. Cost is an elusive term and where fictitious items are arbitrarily included in the estimation of cost, the result is price fixing. The new law is intended to legalize agreements not to sell below cost, but where such agreements are employed as a cloak for price fixing, they should be treated the same as direct price arrangements.[53]

The Act is more explicit with regard to production agreements. It lists among its policies the promotion of "the fullest possible utilization of the present productive capacity of industries" and the avoidance of "undue restrictions upon production (except as may be temporarily required)." The meaning of these terms is not self-evident. Can an undue restriction upon production ever be in the public interest, even temporarily? Doesn't undue mean improper? Would a restriction which is not "undue" be sustained as a permanent measure? Is the intention to permit both "undue" temporary restrictions and "due" permanent restrictions? Is a permanent curtailment consistent with the fullest possible utilization of present capacity?

The phrasing of the Act is thus far from felicitous. Some forms of production control are undoubtedly to be sanctioned. But can it fairly be said that the statute as worded envisages a system of production quotas or curbs upon the expansion of productive capacity or enforced idleness of plants and machines? It seems probable that temporary expedients to check unassimilable surpluses and constructive proposals to effect a balance between supply and demand are permissible. But more drastic efforts to limit production are unauthorized by the statute and are still subject to the anti-trust laws.

Limitations of space preclude any extended discussion of the effects of the new law upon other forms of collective action. The problems can be briefly indicated. Are agreements dividing territories and apportioning business "monopolistic practices"? Is a sales agency arrangement whereby the bulk of an industry's products is marketed through a single agency a monopoly? Are resale price maintenance agreements valid? Can arbitration agreements or credit bureau activities be enforced by group boycotts? Are pooling arrangements lawful ? The statute leaves these queries unanswered.[54] If monopoly and monopolistic practice are construed as mere synonyms for restraint of trade, as suggested by Chief Justice White in the Standard Oil Case,[55] the exemptions from the anti-trust laws that will be permitted will be slight. It is inconceivable that the statute will receive a narrow construction tending to defeat its declared aims. Notwithstanding executive approval of the codes, the final word rests with the courts. There are many legal reefs and shoals upon which the best considered codes may be wrecked. The technical difficulties are not to be minimized. It must not be overlooked that the anti-trust laws remain in force until a code is approved, and even after approval or issuance, all action not in compliance with the code is subject to attack by governmental or private suit. To assert that those unpopular laws have been repealed is to father a pious hope.[56]

Constitutionality of the Statute

A discussion of constitutionality embarks one upon an uncharted sea of prophecy. Unprecedented conditions required unprecedented action. The emergency created a mist in which the familiar contours of the landmarks of constitutional decision seemed blurred or even lost. While the old precedents may not be a fair measure of the validity of this unprecedented legislation, one must either be guided by them or resort to sheer guess or intuition. Limitations of space permit only a suggestion of the constitutional difficulties.[57]

Doctrine of Emergency

The attempt will undoubtedly be made to justify the doubtful features of the new law on the grounds of emergency. This resurrects a doctrine of constitutional law which is still amorphous and which has never fully developed. In the rent cases,[58] the Supreme Court sustained for the period of the emergency legislation designed to cope with the serious conditions arising out of a general housing shortage. In Wilson v. New,[59] an emergency statute establishing an eight hour day for railroad employees and forbidding for a limited period the reduction of wages below the rate prevailing for the previous longer work day was upheld.

Do these decisions support the view, which seems to have been entertained by some, that constitutional limitations may be ignored during an emergency?

We are accustomed to abnormal expansion of governmental authority in times of war, but even in the cases involving the war-time regulation of industry, the Supreme Court emphatically asserted that the existence of a state of war did not remove or change the limitations upon Congressional authority imposed by the Constitution.[60] But there

52. The President upon signing the bill said, "Let me make it clear, however, that the Anti-Trust Laws still stand firmly against monopolies that restrain trade and price fixing which allows inordinate profits or unfairly high prices." Compare Jaffee and Tobriner, The Legality of Price-Fixing Agreements (1932) 45 Harv. L. R. 1164.

53. A great variety of practices were regarded as of dubious legality because of their intimate relation to prices. See American Column & Lumber Co. v. U. S. 257 U. S. 377, 42 Sup. Ct. 114 (1921); U. S. v. American Linseed Oil Co., 262 U. S. 371, 43 Sup. Ct. 607 (1923); compare the petition in U. S. v. Sugar Institute, Inc. (So. Dist. of N. Y.—decision reserved after trial) and numerous recent consent decrees. It was Senator Wagner's opinion, that such practices, if fairly calculated to accomplish the purposes of the law, may be embodied in codes.

54. A negative answer can be expected to most of the questions.

55. Supra note 4 at 61. But cf. U. S. v. Whiting, 212 Fed. 466, 478 (D. Mass. 1914).

56. The validity of much collective action is free of doubt, viz. the elimination of fraudulent practices, adequate credit supervision, cost accounting, interchange of information regarding current and future prices, explanations of statistical data, reasonable efforts to balance production, prevention of below cost price cutting and loss leaders, to mention but a few.

57. A more detailed treatment by the writer is being prepared for early publication in the Harvard Law Review.

58. Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458 (1921); Marcus Brown Holding Co. v. Feldman 256 U. S. 170, 41 Sup. Ct. 465 (1921); Edgar A. Levy Leasing Co., Inc. v. Siegel, 258 U. S. 242, 42 Sup. Ct. 289 (1922); Chastleton Corp. v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405 (1924); People ex rel Durham R. Corp. v. La Fetra, 230 N. Y. 429, 130 N. E. 601 (1921); cf. People v. Moynihan, 121 Misc. 84, 200 N. Y. Supp. 434 (Co. Ct., 1923) (fuel administration).

In Lochner v. N. Y., 198 U. S. 45, 25 Sup. Ct. 539 (1905), the existence of an emergency was said to be the basis of decision in Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383 (1898). See also the discussion of prior decisions in Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923). The emergency milk legislation in New York has recently been sustained by the Court of Appeals. People v. Nebbia, not yet reported.

59. 243 U. S. 332, 37 Sup. Ct. 298 (1917).

60. See Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 156, 40 Sup. Ct. 106, 108 (1919); U. S. v. Cohen Grocery Co., 255 U. S. 81, 88, 41 Sup. Ct. 298, 300 (1921); cf. United States v. New River Collieries, 262 U. S. 341, 43 Sup. Ct. 565 (1923). See generally, Bowman, The Constitution in the War (1922), 2 B. U. L. Rev. 22; 3 Willoughby, Constitution of the United States (2d ed., 1929), § 1035 et seq.

are decisions sustaining governmental action in times of war which would probably be set aside in normal times.[61]

The Constitution contains specific grants of power to Congress and imposes definite limitations upon the exercise of its authority. No one would contend that during a period of economic distress, Congress could suspend the writ of habeas corpus or prohibit the free exercise of any religion. But the generality of some of the constitutional provisions must be construed in the light of the extraordinary conditions which prompts extraordinary legislation. The existence of an emergency is an important factor in the determination of their scope and meaning. The concept of due process is elastic and expands and contracts with changes in economic conditions. The cases reviewed above are direct authority for this view.

But the question seems never to have been presented whether there can be a similar expansion of the Congressional power over commerce in times of emergency. One can confidently expect a liberal construction of the commerce clause by the Supreme Court, especially in borderline cases, but it is difficult to believe that an assumption of jurisdiction over local business transactions unconnected with interstate commerce would be sustained. The presence of an emergency is an important factor in constitutional interpretation; it may result in the restriction of the normal rights of the individual; it does not however afford a blanket exemption from constitutional limitations, nor convert a federal into a strongly centralized system of government.[62]

Commerce Clause

In determining the proper scope of the statute, which was enacted under the Congressional power to regulate interstate and foreign commerce, there are three constitutional questions to be considered:

1. Can the act be applied to intrastate trades which are in competition with interstate companies?

2. Can the act be applied to purely local trades which are not in competition with interstate businesses?

3. Can the act be applied to all phases of the business activity of interstate companies?

1. Suppose a code is established for a national industry such as cotton textiles and companies manufacturing and selling their product within a state refuse to abide by its terms. Can the code be enforced against such local enterprises where the competition of the latter is shown to jeopardize the operation and continuance of the code? It is apparently the opinion of the proponents of the law that such local competition can be curbed. Senator Wagner argued before the Senate as follows:

"A survey of a few cases, however, shows that there will be ample power in the bill to deal effectively with industry as a whole. In the famous Shreveport case (1914) (234 U. S. 342) the Court held that the Interstate Commerce Commission had power to regulate the purely intrastate rates of a railroad, upon a showing that these intrastate rates were lower than the rates fixed by the Commission for similar distances between Louisiana and Texas. The Court did not base its decision upon the ground that an interstate carrier was being regulated. In fact, Congress has no power to regulate the purely intrastate rates of such a carrier if they do not affect interstate commerce. The decision rested upon the fact that the flow of goods between the two States was burdened when goods could be transported an equal distance within the State of Texas for less money. In my opinion, this is strictly analogous to a situation where the flow of interstate commerce into a particular State might be burdened by the practices governing the sale of goods of the same kind within the State by concerns doing an intrastate business. Thus if a local manufacturing concern in State A paid its labor starvation wages, and by this unfair practice sold goods in the local market for an excessively low price, this might be a burden upon competitive goods flowing in from another State, manufactured by an interstate business subject to a code of fair competition, including labor provisions.

"The language of the present Chief Justice, then an Associate Justice, in the Shreveport case sustains a broad interpretation. He wrote that the authority of Congress extends—

" 'To the maintenance of conditions under which interstate commerce may be conducted upon fair terms. . . . This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end.' "[63]

The Shreveport case[64] is a persuasive analogy, but it is far from controlling. Its ambit must be widely extended by the Supreme Court to embrace the situation in the hypothetical case posed above.

There is an additional principle of constitutional interpretation which renders some support to the position taken by Senator Wagner. Where there is such an intermingling of interstate and intrastate commerce that the control of one is physically impossible without the regulation of the other, the Federal power is paramount.[65]

2. Emergency or no emergency, it is difficult to believe that the Supreme Court would sustain codes regulating the conduct of purely local trades, or industries which do not engage in commerce[66] or which are not in direct competition with interstate businesses.

No attempt, so far as the writer is aware, has ever been made by the Federal government to regulate local trades. Consequently, one must rely, in support of the conclusion asserted, upon the cases upholding the authority of the states.[67] The pervasive and far reaching power of Congress under the commerce clause has been recognized in a long line of decisions upholding a wide

61. Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 49 Sup. Ct. 314 (1929) (price fixing).

62. Nor does the welfare clause in the preamble enlarge federal powers. See Jacobson v. Massachusetts, 197 U. S. 11, 22, 25 Sup. Ct. 358, 359 (1905); United States v. Boyer, 85 Fed. 425, 430 (W. D. Mo., 1898); Tucker, The General Welfare (1922), 8 Va. L. Rev. 167, 170.

63. 77 Cong. Rec. 5256-5257 (1933).

64. Houston, E. & W. T. Ry. Co. v. U. S., 234 U. S. 342, 34 Sup. Ct. 833 (1914). See also, American Exp. Co. v. So. Dakota, 244 U. S. 617, 37 Sup. Ct. 656 (1917); Illinois Cent. Ry. v. Public Utility Comm., 245 U. S. 493, 38 Sup. Ct. 170 (1918); Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. R. Co., 257 U. S. 563, 42 Sup. Ct. 232 (1922); cf. Southern Railway Co. v. U. S., 222 U. S. 20, 32 Sup. Ct. 2 (1911).

65. Minnesota Rate Cases, 230 U. S. 352, 431, 432, 33 Sup. Ct. 729, 754 (1913); Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. R. Co., 257 U. S. 563, 42 Sup. Ct. 232 (1922); U. S. v. N. Y. C. R. R. Co., 272 U. S. 457, 464, 47 Sup. Ct. 130 (1926); Interstate Commerce Comm. v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436 (1912).

66. Thus in Federal Baseball Club v. Nat. League of Professional Baseball Clubs, 259 U. S. 200, 42 Sup. Ct. 465 (1922), the Sherman law was held not to apply to an alleged conspiracy to monopolize the baseball business. See also Blumenstock Bros. Advertising Agency v. Curtis Pub. Co., 252 U. S. 436, 40 Sup. Ct. 385 (1920) (advertising contracts). The insurance cases are also illuminating. Paul v. Virginia, 8 Wall. 168 (U. S., 1868); N. Y. Life Ins. Co. v. Deer Lodge Co., 231 U. S. 495, 34 Sup. Ct. 167 (1913); Bothwell v. Buckbee, Mears Co., 275 U. S. 274, 48 Sup. Ct. 134 (1927).

See also Moore v. N. Y. Cotton Exchange, 270 U. S. 593, 46 Sup. Ct. 367 (1926); Ware & Leland v. Mobile County, 209 U. S. 405, 28 Sup. Ct. 526 (1908); Hopkins v. U. S., 171 U. S. 578, 19 Sup. Ct. 40 (1898).

67. It is of course true that cases upholding the validity of state taxation and regulation as not constituting an interference with interstate commerce do not negate the existence of federal power to regulate the same activity. "It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause." Sutherland, J., in Binderup v. Pathe Exchange, 263 U. S. 291, 311, 44 Sup. Ct. 96 (1923). The powers of the two sovereignties overlap in part. But there is an area which is reserved to the states, to which federal control may not be extended. Cf. Industrial Ass'n of San Francisco v. U. S., 268 U. S. 64, 45 Sup. Ct. 403 (1925).

variety of regulatory legislation.[68] In its general features, the present law is undoubtedly a proper exercise of Congressional authority. A broad area has been plotted out by the decisions as the proper sphere of federal action. But there are business transactions and trades to which the federal power does not extend. Words are not helpful in locating the dividing line—one must turn to concrete cases and the facts.

3. Suppose a code purports to regulate activities of interstate companies that are not directly connected with the interstate movement of goods. To take a concrete example, suppose a code requires the use of various safety appliances in coal mines. Does the fact that the product of the mine enters commerce serve as a sufficient basis for such assumption of federal jurisdiction? The Supreme Court has repeatedly insisted upon the distinction between production and commerce. "Mining is not interstate commerce, but like manufacturing, is a local business, subject to local regulation and taxation."[69] "Commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture."[70] While language of this character is found in cases dealing with totally different problems, it should induce caution on the part of the administration in regulating activities whose relation and effect upon commerce is not susceptible of direct proof.

Are the labor provisions of the act consistent with the dualism of the American governmental system? Are hours of labor, conditions of employment, and rates of pay related to production and thus subject solely to state control or to commerce and thus a matter of federal concern? The Child Labor Cases indicate the former. In Hammer v. Dagenhart[71] the court in a five to four decision declared unconstitutional a statute forbidding the transportation in interstate commerce of articles manufactured by child labor. Said Mr. Justice Day, "Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation." In response to the contention that Congress could exert the authority to prohibit the transportation of child made goods in order to prevent the unfair competition between states which permitted and states which forbade child labor, the court said:

> "There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress."[72]

The present law was so drafted as to permit of various verbal distinctions between the Dagenhart case and the regulation of labor conditions by industrial codes. But in all candor, it must be admitted that to sustain the codes, either the Dagenhart case, which was decided by a divided court, must be overruled[73] or the court must recognize the existence of emergency powers in Congress to regulate matters that are normally reserved to the states.

It must not be thought that because direct regulation of production may not be permitted that the federal government is entirely without power with respect to matters of production. On the contrary, as the Sherman law decisions indicate, there is a far-reaching control over the production of interstate companies to the extent that commerce can be said to be affected.[74] Here again, concrete cases will be controlled by their facts and not by general principles. To dogmatize upon the basis of the language in the cases is to mislead rather than enlighten.

Delegation of Power

The delegation of legislative power is generally said to be forbidden by the Constitution. Administrative functions and the execution of policies established by the Congress may be delegated to the executive or to administrative bodies. The formula is an empty one. Actually every delegation by Congress, no matter how broad, has been sustained by the courts.[75] The issue is whether the statutory standard is sufficiently definite for the administrative agency to carry out the legislative will.[76] While the policy of the Recovery Act as defined in Section one is, as we have seen, both vague and uncertain, it is no more indefinite than the standard of "public interest" which is the criterion under the Interstate Commerce Act for administrative approval of the acquisition of control of one carrier by another.[77] Moreover if Congress can delegate to the Federal Trade Commission the elimination of

68. For an interesting collection of cases, see McLaughlin, Cases on Federal Anti-Trust Laws (1933) 82-85. See also Gavit, The Commerce Clause of the U. S. Constitution (1932). That the administration need experience little embarrassment in its control of national industry is indicated by the liberal utterances and holdings of the Supreme Court in such cases as Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397 (1922); Swift & Co. v. U. S., 196 U. S. 375, 25 Sup. Ct. 276 (1905); Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436 (1904); Binderup v. Pathe Exchange, 263 U. S. 291, 44 Sup. Ct. 96 (1923); Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 42 Sup. Ct. 106 (1921); Lemke v. Farmers' Grain Co., 258 U. S. 50, 42 Sup. Ct. 244 (1922); cf. Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681 (1890).

69. Van Devanter, J., in Oliver Mining Co. v. Lord, 262 U. S. 172, 178, 43 Sup. Ct. 526, 529 (1923).

70. Utah Power & Light Co. v. Pfost, 286 U. S. 165, 181, 52 Sup. Ct. 548 (1932). In Heisler v. Thomas Colliery Co., 260 U. S. 245, 259, 43 Sup. Ct. 83 (1922), an attempt was made to invalidate a Pennsylvania tax upon anthracite coal as a burden upon interstate commerce because 80% of the total production is shipped to other states. In denying the contention, the court pointed out that such a holding "would nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the west and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states at the very inception of their production or growth." See also United Leather Workers' International Union v. Herkert, 265 U. S. 457, 44 Sup. Ct. 623 (1924); Champlin Refining Co. v. Corporation Comm., 286 U. S. 210, 235, 52 Sup. Ct. 559 (1932).

71. 247 U. S. 251, 38 Sup. Ct. 529 (1918).

72. See also Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 Sup. Ct. 449 (1922), invalidating a tax measure penalizing the use of child labor. See Powell, Child Labor, Congress and the Constitution (1922), 1 North Carolina L. Rev. 61.

73. See the stimulating article by Professor Corwin, Congress' Power to Prohibit Commerce—A Crucial Constitutional Issue (1933), 18 Corn. L. Q. 477, challenging the correctness of the Dagenhart decision.

74. See Wahrenbrock, Federal Anti-Trust Law and the National Industrial Recovery Act (1933), 31 Mich. L. Rev. 1009, 1045.

75. Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495 (1892); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1904); J. W. Hampton, Jr., & Co. v. U. S., 276 U. S. 394, 48 Sup. Ct. 348 (1928). The authorities are collected in (1933), 31 Mich. L. R. 786.

76. The precision of a criminal statute is not required. Mahler v. Eby, 264 U. S. 32, 41, 44 Sup. Ct. 283, 287 (1924).

77. N. Y. Central Securities Corp. v. U. S., 287 U. S. 12, 53 Sup. Ct. 45 (1932).

(*Continued on page* 482)

PROGRAM FOR THE ASSOCIATION'S FIFTY-SIXTH ANNUAL MEETING

THE Entertainment Committee, under the chairmanship of Mr. Laurence W. Smith, has prepared a program for visiting members and their ladies which is unusually varied and attractive. There will be something of special interest for everybody and the only difficulty about it will be that presented by the number of diversions offered for selection. A specially unique feature will be the visit on Saturday to "Lakewood Farm," the magnificent summer farm home of Mr. George Getz of Chicago, where everything from a wonderful bathing beach to most unusual botanical gardens and even a surprising private zoo will be afforded. We print elsewhere photographs of two members of the reception committee at "Lakewood Farm" who are looking forward to the visit of the Bar Association members and their ladies with keen interest. They are known in private life as Mr. and Mrs. Ursus Maritimus.

To go more into the details of this enticing program, on Monday, August 28, there will be a complimentary dinner to the officers and members of the Executive Committee. Following this, on Tuesday, the visiting ladies will be taken to the beautiful home of Mrs. Claude C. Hopkins at Spring Lake for a garden party. Spring Lake lies between Lake Michigan and Grand Rapids. The party will pass through Eastmanville where the beautiful gardens of the Avery and Hefferan summer homes may be seen. Following the party at the famous Hopkins gardens tea will be served at the Spring Lake Country Club.

On Thursday, August 31, the Junior League will tender a luncheon to the visiting ladies followed by a style show at "Holmdene," the magnificent estate of Mr. Edward Lowe. Further entertainment will be provided for Wednesday and Friday, but the details are not yet completed. On the latter date there will be entertainment for children if the attendance of children warrants it.

On Saturday, Sept. 2, all of the visitors will be the guests of the Grand Rapids Bar Association at the magnificent summer farm home of Mr. George Getz of Chicago. "Lakewood Farm" is one of the most famous institutions of western Michigan. The home overlooks Lake Michigan and is just above one of the most beautiful stretches of beach to be found. The botanical gardens are unusual and Mr. Getz maintains one of the best private zoos in the country. There are wooded grooves and open spaces for all kinds of games. Two miniature golf courses are maintained and will be at the disposal of the guests.

"Bring your bathing suits," the Committee advises. The private club house of Mr. Getz will be available for dressing purposes. There will also be boating, swimming, fishing, games, bridge upon the wide verandas of the Getz home, an afternoon of pleasure winding up with a wonderful picnic dinner.

Arrangements are being made to have one of the palatial lake steamers leave Holland for Chicago on Saturday evening so that the visitors intending to visit the Century of Progress Exposition may take a boat for Chicago without returning to Grand Rapids. A cool ride during the night upon Lake Michigan should appeal to many. For others, sleepers will leave from Holland if the demand warrants. Those who have never seen the Great Lakes and in particular the sand dunes and beaches of Lake Michigan are in for a treat.

The courtesies of all of the Grand Rapids Clubs and four of the largest Country Clubs will be extended to visitors. Grand Rapids is noted for its beautiful homes and for its magnificent gardens. Numerous garden parties not listed above will be given.

Several magnificent exhibits of furniture will be open for the entertainment of lawyers and their guests. The Ryerson Public Library is arranging for a special exhibit which will include a famous collection of early maps of the northwest territory. The Grand Rapids Art Association located but a few blocks from the Library is also arranging for an exhibit of unusual fine paintings.

The Commissioners on Uniform State Laws hold their meeting during the week preceding the meeting of the American Bar Association. Following is the attractive program for their entertainment:

Wednesday, August 23. A reception and tea for the wives and guests for the Commissioners at the Women's City Club. Thursday, August 24—Luncheon for wives and guests at Blythefield Country Club. Later in the afternoon the guests will go through the beautiful gardens of Mr. Joseph H. Brewer, adjoining this club, and have tea. Friday, August 25—A bridge-luncheon for the ladies at Kent Country Club. These are the two most beautiful country clubs of which Grand Rapids boasts and they can scarcely be surpassed for setting and scenic beauty and place. Saturday, August 26—Complimentary dinner to the Commissioners and wives and guests.

On Sunday, August 27, the Commissioners and wives and guests and the executive committee will be taken for a motor ride up the "Scenic Highway" along Lake Michigan, back down to the beautiful beach at Grand Haven, around the Oval and then to the Spring Lake Country Club for a buffet supper.

The membership of the General Committee on Arrangements which is working to make this meeting one of the most successful on record is as follows: John M. Dunham, General Chairman; Mark Norris, Benjamin P. Merrick, Julius H. Amberg, David A. Warner, Stewart E. Knappen, Willard Keeney (President Grand Rapids Bar Association) Laurent K. Varnum (Secretary Grand Rapids Bar Association).

The Chairman of other committees are: Reception, Raymond W. Starr; Michigan State Bar Association Committee, Carl W. Essery, Acting President, Michigan State Bar Association; Finance, Paul O. Strawhecker; Entertainment, Laurence W. Smith; Judicial, Hon. John S. McDonald, Chief Justice Michigan Supreme Court, Honorary Chairman, Hon. William B. Brown, Chairman; Sports, Morton P. Keeney; Courtesies, Seigel W. Judd; Publicity, Clare J. Hall; Headquarters and Information, Oscar C. Waer; Transportation, John J. Smolenski; Special Exhibits,

William K. Clute; Picnic, Francis D. Campau; Ladies Entertainment Committee, Mrs. David A. Warner; Hostess Committee, Mrs. Thomas F. McAllister.

Program

Wednesday Morning, August 30, at 10 o'clock

Civic Auditorium

Address of Welcome.

Response to Address of Welcome.

Annual Address by the President of the Association.

Announcements.

Report of Secretary.

Report of Treasurer.

Report of Executive Committee.

(State delegations will meet at the close of this session to nominate a member of the General Council for those states whose member of the General Council has not registered in attendance, and to elect five members of the State Council for each state. Vacancies on the General Council and places of meeting of state delegations will be announced before close of session.)

Wednesday Afternoon, August 30, at 2:30 o'clock

Civic Auditorium

Address by Hon. John J. Parker, Judge of the Fourth Circuit Court of Appeals, Charlotte, N. C.

Statement concerning the work of the American Law Institute, William Draper Lewis, Director.

REPORTS OF SECTIONS

Comparative Law Bureau, Charles S. Lobingier, Washington, D. C.

Conference of Bar Association Delegates, David A. Simmons, Houston, Texas.

Criminal Law, Justin Miller, Durham, N. C.

Judicial Section, John M. Grimm, Cedar Rapids, Iowa.

Legal Education and Admissions to the Bar, John Kirkland Clark, New York City.

Mineral Law, D. J. F. Strother, Welch, W. Va.

Patent, Trademark and Copyright Law, Jo Baily Brown, Pittsburgh, Pa.

Public Utility Law, Lovick P. Miles, Memphis, Tenn.

National Conference of Commissioners on Uniform State Laws, William M. Hargest, Harrisburg, Pa.

Wednesday Evening, August 30, at 8 o'clock

Civic Auditorium

Address by Dr. Leonide Pitamic, Envoy Extraordinary and Minister Plenipotentiary of Yugoslavia.

10:00 o'clock

Pantlind Hotel

Reception by the President of the Association.

Thursday Morning, August 31, at 10 o'clock

Civic Auditorium

REPORTS OF COMMITTEES

American Citizenship, F. Dumont Smith, Hutchinson, Kansas.

International Law, James Grafton Rogers, Boulder, Colo.

Jurisprudence and Law Reform, J. Harry Covington, Washington, D. C.

Uniform Judicial Procedure, George W. McClintic, Charleston, W. Va.

Federal Taxation, Silas H. Strawn, Chicago, Ill.

Commercial Law and Bankruptcy, Jacob M. Lashly, St. Louis, Mo.

Admiralty and Maritime Law, Braden Vandeventer, Norfolk, Va.

Commerce, Rush C. Butler, Chicago, Ill.

Publicity, Walter H. Eckert, Chicago, Ill.

Memorials, William P. MacCracken, Jr., Washington, D. C.

Thursday Afternoon, August 31, at 2 o'clock

Civic Auditorium

Address by Hon. Patrick A. McCarran, United States Senator from Nevada, "Growth of Federal Executive Power."

REPORTS OF COMMITTEES

Aeronautical Law, John C. Cooper, Jr., Jacksonville, Fla.

Communications, John W. Guider, Washington, D. C.

Professional Ethics and Grievances, Arthur E. Sutherland, Rochester, N. Y.

Canons of Ethics, Charles A. Boston, New York City.

Unauthorized Practice of the Law, John G. Jackson, New York City.

Practice of Law in District of Columbia, William C. Sullivan, Washington, D. C.

Judicial Salaries, Alexander B. Andrews, Raleigh, N. C.

Thursday Evening, August 31, at 8:30 o'clock

Civic Auditorium

Address by Hon. Homer S. Cummings, The Attorney General of the United States.

Friday Morning, September 1, at 10 o'clock

Civic Auditorium

REPORTS OF COMMITTEES

International Bar Relations, John H. Wigmore, Chicago, Ill.

Coordination of the Bar, Jefferson P. Chandler, Los Angeles, Calif.

Insurance Law, A. T. Vanderbilt, Newark, N. J.

Legal Aid Work, Reginald Heber Smith, Boston, Mass.

Change of Date of Presidential Inauguration, L. Barrett Jones, Jackson, Miss.

Noteworthy Changes in Statute Law, Joseph P. Chamberlain, New York City.

Friday Afternoon, September 1, at 2:00 o'clock

Civic Auditorium

Address. (Speaker and subject to be announced.)

Administrative Law, Louis G. Caldwell, Washington, D. C.

Facilities of the Law Library of Congress, James Oliver Murdock, Washington, D. C.

Federal Judicial Appointments, John W. Davis, New York City.

Award of American Bar Association Medal.

Election of Officers.

Miscellaneous Business.

Friday Evening, September 1, at 7:30 o'clock

Civic Auditorium

Annual Dinner of the Association.

Photographed from Detroit News Airplane

AERIAL VIEW OF BLYTHEFIELD COUNTRY CLUB

Programs of Committees, Sections and Other Organizations

Standing Committee on Commercial Law and Bankruptcy

Room A, Auditorium

Tuesday, Aug. 29, 2 P. M.

Jacob M. Lashly, Chairman, presiding.

1. The work and results, to date, of the Conference group, in considering and preparing amendments to National Bankruptcy Law, Paul H. King, Detroit, Michigan.

2. Proposal to extend bankruptcy jurisdiction to include municipalities and other taxable subdivisions, —a discussion. Edwin H. Barker, New York, N. Y.; Charles M. Hay, St. Louis, Mo.; Asa Briggs, St. Paul, Minn.

3. Proposal for Federal legislation, under bankruptcy purview, for corporate reorganizations. Edwin S. S. Sunderland, New York, N. Y., and James R. Morford, Wilmington, Delaware, Members of the Committee.

A general discussion will be participated in by members of the Committee, and any interested member of the Association or guest present, in further development of the subjects upon the agenda or other subjects germane to the work and interest of the Committee.

Special Committee on Unauthorized Practice of the Law

Room C, Auditorium

Tuesday, August 29, at 2:00 P. M.

John G. Jackson, Chairman, presiding.

Consideration of "Commercial and Credit Agencies and their Relation to the Practice of the Law."

General Discussion.

Comparative Law Bureau and Proposed Section of International and Comparative Law

Room B, Auditorium

Tuesday, August 29, 1933

10:00 A. M.

Organization meeting for election of officers and members of Council, and adoption of By-Laws.

Conference of Bar Association Delegates

Colonial Room, Pantlind Hotel

Monday, August 28, 1933

Morning Session, 10:00 o'clock

David Andrew Simmons, Chairman, presiding.

Address by Chairman.

Debate: Best Method of Judicial Selection.

1. "Executive Appointment of Judges," Julius Henry Cohen, New York City.

2. "Direct Election of Judges," Joseph F. O'Connell, Boston, Mass.

3. "Bar Association Primaries," Paul Lamb, Cleveland, Ohio.

4. "Miscellaneous Methods of Selection," E. Smythe Gambrell, Atlanta, Ga.

Discussion by the delegates of Methods of Judicial Selection.

Report of Committee on Judicial Selection, A. V. Cannon, Cleveland, Ohio.

Luncheon, Swiss Room, Pantlind Hotel.

Afternoon Session, 2:00 o'clock

Colonial Room, Pantlind Hotel

Remarks by Clarence E. Martin, President of the American Bar Association, on "Bar Integration."

Committee Reports:

Cooperation Between the Press and the Bar, Andrew R. Sherriff, Chicago, Illinois.

State and Local Bar Activities, Morris B. Mitchell, Minneapolis, Minnesota.

Rule-Making Power of the Courts, Frank W. Grinnell, Boston, Mass.

Accident Litigation, Henry S. Drinker, Jr., Philadelphia, Pennsylvania.

Bar Integration, Carl V. Essery, Detroit, Michigan.

Bar Reorganization, Robert H. Jackson, Jamestown, N. Y.

7:00 P. M.

Colonial Room, Pantlind Hotel

Annual Dinner for Members of the Conference and the American Judicature Society, ladies and guests.

Section of Criminal Law

Colonial Room, Pantlind Hotel

Tuesday, August 29, 1933

2:00 P. M.

Justin Miller, Chairman, presiding.

Report of Chairman.

Report of Secretary.

Report of Committees on:

Cooperation with American Law Institute, Howard B. Warren, Shreveport, La.

Cooperation with American Legislators' Association, John H. Chambliss, Chattanooga, Tenn.

Cooperation with American Prison Association, Sanford Bates, Washington, D. C.

Cooperation with International Association of Chiefs of Police, Justin Miller, Durham, N. C.

Criminal Procedure, James J. Robinson, Bloomington, Ind.

Medico-Legal Problems, Albert J. Harno, Urbana, Ill.

Psychiatric Jurisprudence, Rollin M. Perkins, Iowa City, Ia.

To Examine and Report upon the Code of Criminal Procedure, Drafted by the American Law Institute, J. Weston Allen, Boston, Mass.

Discussion of Report by: Floyd E. Thompson, Chicago, Ill.; Wm. Draper Lewis, Philadelphia, Pa.

8:00 P. M.

Report of Committee on Personnel in the Administration of Criminal Justice, John Barker Waite, Ann Arbor, Mich.

Discussion of Report by: Magistrate Jonah J. Goldstein, New York City; Charles P. Taft, 2nd, Cincinnati, Ohio; Pliny W. Marsh, Detroit, Mich.

Proposed Section of Insurance Law

Room F, Auditorium

Monday, August 28

11 A. M.

Arthur T. Vanderbilt, Presiding

Report of temporary officers.

Appointment of nominating committee.

Address by Edwin Denby, Philadelphia, Pa., "Unemployment Insurance."

Address by Garner W. Denmead, Vice President and General Counsel, New Amsterdam Casualty Company, "Problems Arising from the Liability of Joint Tort Feasors."

2 P. M.

Address by George S. Van Shaick, Superintendent of Insurance of the State of New York, "Some Legal Aspects of Insurance Administration."

Address by Walter H. Bennett, Secretary-Counsel of the National Association of Insurance Agents, "Insurance Premiums as Trust Funds."

Report of nominating committee and election of officers.

Unfinished business.

Adjournment.

Judicial Section

Room F, Auditorium

Tuesday, August 29, 1933

10:00 o'clock A. M.

John M. Grimm, Chairman of the Judicial Section, presiding.

Address of Welcome by Hon. Arthur J. Tuttle, Judge of the United States District Court, Detroit, Michigan.

Response by Hon. Edward R. Finch, Vice-Chairman, Presiding Justice of the Supreme Court, Appellate Division, First Department, New York City.

Address by Professor Samuel Williston, Harvard Law School, "The Judge and the Professor."

General Discussion of the following subjects:

1. Waiver of juries in civil and criminal cases.
2. Oral or written instruction to the jury.
3. Less than unanimous verdicts.

Joint Meeting with National Conference of Judicial Councils

2:00 o'clock P. M.

Edson R. Sunderland, Chairman of the National Conference of Judicial Councils, presiding.

Subject for discussion: "Problems in Appellate Procedure."

1. The Form and Substance of the Record on Appeal.
   a. Its scope: methods of eliminating unnecessary material.
   b. Its expense: the use of typed or printed records.
   c. Its form, narrative or question and answer.
   d. Methods of specifying, limiting or settling the issues to be considered on appeal.

Discussion led by: Floyd E. Thompson, Chicago, Ill.; John M. Dunham, Grand Rapids, Mich.

2. The Oral Argument on Appeal.
   a. Methods of judges in preparing for the oral argument.

b. Methods of judges in conducting the oral argument.

c. Methods of judges in disposing of the case after the oral argument.

Discussion led by Chief Justice Fletcher Riley, of Oklahoma, and Alfred Bettman, of Cincinnati.

3. Intermediate Appellate Courts. The Principle which should Govern the Assumption of Jurisdiction by the Highest Court after Decision by an Intermediate Court.

Discussion led by Edson R. Sunderland, of Ann Arbor, Mich.

7:00 o'clock P. M.

Annual Dinner for Members, Ladies and Guests. (Swiss Room, Pantlind Hotel.)

Addresses by: Justice Benjamin C. Hilliard, Supreme Court of Colorado, "The Reply Brief."

Justice Frederick E. Crane, Court of Appeals of New York, "A Century of Progress, To Where?"

Section of Legal Education and Admission to the Bar

Veterans' Room, Civic Auditorium

Tuesday, August 29, 2:00 P. M.

John Kirkland Clark, Chairman, Presiding.

Address by the Chairman.

General Discussion of the subject "What Constitutes a Good Legal Education."

Speakers: Dean Roscoe Pound, Harvard Law School.

Jerome Frank, Research Associate, Yale Law School, Counsel, U. S. Department of Agriculture.

Section of Mineral Law

Room G, Civic Auditorium

Tuesday, August 29

10:00 A. M.

D. J. F. Strother, Chairman, Presiding.

Reading of Minutes.

Disposition of Routine Matters.

Appointment of Nominating Committee.

Address by Hon. Pat Malloy, Assistant Attorney General of the United States, "Taxation in Industry."

Report of Nominating Committee.

2:00 P. M.

Address by Peter Q. Nyce, Washington, D. C., "National Industrial Recovery Act,—Its Administration and Effect on Oil and Gas."

Report of Committee on Conservation of Mineral Resources.

Reports of State Committees on Conservation.

Section of Patent, Trademark and Copyright Law

Directors' Room, Civic Auditorium

Monday and Tuesday, August 28 and 29, 1933

Jo Baily Brown, Chairman, presiding.

Sessions will be held at 10:00 A. M. and 2:00 P. M. each day and reports of Section Committees and new matters that may be brought up will be presented and considered.

Tuesday, August 29, 7:00 P. M.

Kent Country Club

Annual Dinner for members, ladies and guests.

HONOURABLE MR. JUSTICE DYSART
Distinguished Canadian Jurist Who Will Attend Annual Meeting

Section of Public Utility Law

Veterans' Room, Civic Auditorium

Monday, August 28, 9:00 A. M.

Meeting of Council, Pantlind Hotel.

First Session, 10:00 A. M.

Lovick P. Miles, Chairman, Presiding.

Address of Welcome. (Speaker to be announced.)

Address by Chairman Lovick P. Miles, Memphis, Tennessee.

Report of Standing Committee to Survey and Report as to Developments during the Year in the Field of Public Utility Law. Leslie Craven, Duke University, Durham, N. C., Chairman.

Address: "Regulation by Conference," Nathaniel T. Guernsey, New York, N. Y.

Discussion of Report and Addresses.

Discussion will be opened by Hon. David E. Lilienthal, Madison, Wisconsin.

Second Session, 2:15 P. M.

Address by Herman Phleger, San Francisco, Cal. (Subject to be announced later.)

Report of Special Committee to Report upon the Extent to which the States and the Federal Government respectively may Regulate Contract Carriers on the Highways and Waterways. E. S. Jouett, Louisville, Kentucky, Chairman.

Discussion of Address and Reports. Discussion will be opened by Kenneth F. Burgess, Chicago, Illinois.

New Business.

Tuesday, August 29

Third Session, 10:00 A. M.

Address by George B. Elliott, Wilmington, N. C., "Practical Aspects of Truck, Bus and Railroad Situation and Probable Effects on the Country."

Address by Harry P. Lawther, Dallas, Tex., "An Integrated Bar."

Report of Committee to Report on the Regulation of Holding Companies and of the Relations between Holding Companies and Affiliated Operating Companies. Henry G. Wells, Boston, Mass., Chairman.

Report of Committee to Report on Legal Aspects Involved in Cases where the Utility Charges Different Rates for Different Classes or Kinds of Service, Certain of which Result in a Loss or Inadequate Profit. William L. Ransom, New York City, Chairman.

Discussion of Address and Reports. Discussion will be opened by Harry J. Dunbaugh, Chicago, Illinois.

Report of Nominating Committee and Election of Officers.

New Business.

2:00 P. M.

Golf, Blythefield Country Club. Putting and bridge for the ladies.

7:00 P. M.

Blythefield Country Club

Annual Dinner for members, ladies and guests. Dancing.

National Conference of Commissioners on Uniform State Laws—Forty-third Annual Meeting

Ball Room, Pantlind Hotel

Tuesday, August 22, to Monday, August 28, inclusive, 1933

Tuesday, August 22

9:00 A. M.

Meeting of Executive Committee.

10:00 A. M.

First Session of Conference:

1. Address of Welcome.
2. Response Thereto.
3. Roll Call.
4. Reading of the Minutes of Last Meeting.
5. Announcement of Appointment of Nominating Committee.
6. Statement of the President.
7. Report of the Treasurer.
8. Report of the Secretary.
9. Report of the Executive Committee.

2:00 P. M.

10. Reports of Standing Committees:
    a. Legislative.
    b. Public Information.
    c. Appointment of and Attendance by Commissioners.
11. Reports of General Committees:
    a. Legislative Drafting.
    b. Uniformity of Judicial Decisions.
12. Reports of Sections:
    a. Uniform Commercial Acts Section.
    b. Uniform Property Acts Section.
    c. Uniform Public Law Acts Section.
    d. Uniform Social Welfare Acts Section.
    e. Uniform Corporation Acts Section.
    f. Uniform Torts and Criminal Law Acts Section.
    g. Uniform Civil Procedure Acts Section.
13. Report of Committee on Amendments of Uniform Commercial Acts.
14. Report of Committee on Uniform Bank Collection Act.
15. Report of Committee on Uniform Letters of Credit Act.
16. Report of Committee on Uniform Sale of Securities Act.
17. Report of Committee on Uniform Stock Transfer Act.
18. Report of Committee on Uniform Trade-Mark Act.
19. Report of Committee on Uniform Trust Receipts Act.
20. Report of Committee on Uniform Acknowledgment of Instruments Act.
21. Report of Committee on Uniform Estates Act.
22. Report of Committee on Uniform Intestacy Act.
23. Report of Committee on Uniform Presumption of Death Act.
24. Report of Special Committee on Uniform Land Registration Act.
25. Report of Committee on Uniform Automobile Liability Security Act.
26. Report of Committee on Uniform Acts Comprising the Motor Vehicle Code.
27. Report of Committee on Uniform Act Regulating Motor Buses and Trucks.
28. Report of Special Committee on Uniform Act for Compacts and Agreements Between States.
29. Report of Special Committee on Uni-

Two Members of the Reception Committee at the Lakewood Farm

form Aeronautics Acts.

30. Report of Committee on Uniform Marriage and Divorce Acts.

31. Report of Committee on Uniform Narcotic Drug Act.

32. Report of Committee on Uniform Settlements Act.

33. Report of Committee on Uniform Foreign Corporation Act.

34. Report of Special Committee on Uniform Cooperative Marketing Act.

35. Report of Committee on Amendments of Uniform Criminal Extradition Act.

36. Report of Committee on Uniform Machine Gun Act.

37. Report of Special Committee on Uniform Criminal Statistics Act.

38. Report of Committee on Uniform Civil Depositions Act.

39. Report of Committee on Uniform Notice of Probate Act.

40. Report of Committee on Uniform Ancillary Administration of Estates Act.

41. Report of Special Committee on Uniform Mechanics' Lien Act.

42. Report of Special Committee on Uniform Act to Establish Wills Before Death of Testator.

43. Report of Special Committee on Uniform Acts Regarding Evidence.

44. Report of Special Committee on Uniform Statute of Limitations Act.

45. Report of Special Committee on Cooperation with American Law Institute.

Wednesday, August 23

9:30 A. M.

Consideration of Draft of Uniform Acknowledgments of Instruments Act.

Consideration of Draft of Uniform Civil Depositions Act.

Consideration of Draft of Uniform Aeronautics Act, including Air Licensing Act and Airport Act.

2:00 P. M.

Consideration of Draft of Uniform Estates Act.

Thursday, August 24

9:30 A. M.

Consideration of Draft of Uniform Intestacy Act.

Consideration of Draft of Uniform Trust Administration Act, including Trustees' Accounting Act.

Consideration of Draft of Uniform Foreign Corporation Act.

2:00 P. M.

Consideration of Draft of Uniform Cooperative Marketing Act.

Friday, August 25

9:30 A. M.

Consideration of Draft of Uniform Bank Collection Act.

2:00 P. M.

Consideration of Draft of Uniform Trade-Mark Act.

3:00 P. M.

Special Orders.

4:00 P. M.

Reports of Committees on Memorials.

Saturday, August 26

9:30 A. M.

Consideration of Draft of Uniform Trust Receipts Act.

Monday, August 28

9:30 A. M.

Consideration of Draft of Amendments to Uniform Negotiable Instruments Act.

2:00 P. M.

Unfinished and New Business.

Adjournment.

National Conference of Bar Examiners

Room C, Civic Auditorium

Tuesday, August 29

10:00 A. M.

James C. Collins, Chairman, Presiding.

Summary of Progress made by National Conference of Bar Examiners, by James C. Collins, Chairman.

Address by Charles E. Clark, Dean of Yale Law School and President of Association of American Law Schools, "The Selective Process of Choosing Law Students and Lawyers."

Address by Charles P. Megan, Chicago, Ill., "Jottings of a Bar Examiner."

Several round tables on subjects of interest to bar examiners will be held in the evening, details to be announced later.

National Association of Attorneys-General
Twenty-Seventh Annual Meeting—Grand Rapids, Michigan

Room E, Civic Auditorium

Monday, August 28, 11:00 A. M.

Hon. James M. Ogden, of Indiana, President, presiding.

Address of Welcome: Hon. Patrick H. O'Brien, Attorney General of Michigan.

Responses: Hon. Charles E. Winters, Attorney General of Porto Rico.

Hon. Thomas E. Knight, Jr., Attorney General of Alabama.

Hon. Philip J. Lutz, Jr., Attorney General of Indiana.

Report of Secretary and Treasurer: Hon. Ernest L. Averill, of Connecticut.

President's Address: "Opinions by Attorney General."

Afternoon Session, 2:30 P. M.

Address: "Office Conferences," Hon. Joseph E. Messerschmidt, of Wisconsin.

Address: "Our Changing Laws as to Taxation," Hon. Cary D. Landis, of Florida.

General Discussion of Addresses.

Tuesday, August 29, 11:00 A. M.

Address: "System in the Office of the Attorney General," Hon. William A. Schnader, of Pennsylvania.

Address: "Our Changing Laws as to Banking," Hon. Joseph E. Warner, of Massachusetts.

General Discussion of Addresses.

Appointment of Committee on Resolutions.

Appointment of Committee on Nominations.

Afternoon Session, 2:30 P. M.

Address: "Office Correspondence," Hon. John W. Bricker, of Ohio.

Address: "Some Observations on the Hawes-Cooper Act," Hon. Raymond T. Nagle, of Montana.

Address: "Civil Proceedings in the Attorney

General's Office in New England," Hon. Lawrence C. Jones, of Vermont.

General Discussion of Addresses.

Committee Reports.

Election of Officers.

Adjournment.

Conference on Personal Finance Law
Annual Luncheon Meeting

Parlor B, Pantlind Hotel, Tuesday, August 29, 1933, 12:30 P. M.

International Association for the Protection of Industrial Property
(American Group)
Annual Luncheon Meeting

Furniture Club, Pantlind Hotel, Wednesday, August 30, 1933, 12:30 P. M.

Committee reports and recommendations.

Election of Officers.

The American Group, formed to enlarge the protection accorded to inventions, marks and designs, and to procure the adoption of laws and agreements relating to such protection, has met annually for the last four years in conjunction with the meeting of the American Bar Association.

Members of the American Bar Association who may be interested are cordially invited to attend the luncheon and meeting, and reservations may be made at General Headquarters, Pantlind Hotel.

Meetings of Law School Alumni Associations and Legal Fraternities

The following Law School Alumni Associations will hold luncheon meetings at the Pantlind Hotel in Grand Rapids. The Chairmen in charge of arrangements whose names are given will furnish more complete information upon request.

University of Chicago Law School Alumni, George Maurice Morris, American Security Bldg., Washington, D. C., Thursday, Aug. 31, 12:30 P. M., Parlor C.

Columbia Law School Alumni, Henry D. Williams, 225 Broadway, New York City, Thursday, Aug. 31, 12:30 P. M., Service Rooms.

Cornell Law Association, William L. Ransom, 40 Wall St., New York City, Thursday, Aug. 31, 12:30 P. M., Parlor B.

George Washington Law School, William C. Van Vleck, George Washington University, Washington, D. C., Thursday, Aug. 31, 12:30 P. M., Furniture Club.

University of Illinois Law School Dinner, Albert J. Harno, Urbana, Ill., Wednesday, August 30, 12:30 P. M., Parlor C.

Harvard Law School Alumni, Julius H. Amberg, Michigan Trust Bldg., Grand Rapids, Mich., Thursday, Aug. 31, 12:30 P. M., Colonial Room.

University of Iowa Law School Alumni, Jesse A. Miller, Equitable Bldg., Des Moines, Ia. Thursday, Aug. 31, 12:30 P. M., Parlor A.

University of Michigan Law School Alumni, Henry M. Bates, Michigan Law School, Ann Arbor, Thursday, Aug. 31, 12:30 P. M., Ball Room.

Northwestern University Law School Alumni, Henry Barrett Chamberlin, 300 W. Adams St., Chicago, Ill., Friday, Sept. 1, 12:30 P. M., Assembly Room.

University of Pennsylvania, Society of the Alumni of the Law Department, Edgar S. McKaig, 1421 Chestnut St., Philadelphia, Pa., Friday, Sept. 1, 12:30 P. M., Service Rooms.

University of Virginia Alumni, Thomas Tinsley Dunn, United Savings Bank, Detroit, Mich., Friday, Sept. 1, 12:30 P. M., Parlor C.

Vanderbilt University Law School Alumni, Earl C. Arnold, Vanderbilt University, Nashville, Tenn., Friday, Sept. 1, 12:30 P. M., Parlor B.

Yale Law School Alumni, Charles E. Clark, Yale University Law School, New Haven, Conn., Wednesday, Aug. 30, 12:30 P. M., Service Rooms.

The following Legal Fraternities will hold meetings in Grand Rapids:

Phi Delta Phi, Lawrence W. DeMuth, 2123 Fourth St., Boulder, Colo., Thursday, Aug. 31, 6:30 P. M., Swiss Room.

Phi Delta Delta, Dora Shaw Heffner, 770 Windsor Blvd., Los Angeles, Cal., Thursday, Aug. 31, 8 A. M., Assembly Room.

The Texas members of the American Bar Association will hold a luncheon meeting on Thursday, Aug. 31, at 12:30 P. M. in the Assembly Room, Pantlind Hotel. Chairman of Arrangements, Harry P. Lawther, Tower Petroleum Bldg., Dallas, Texas.

Washington Letter

1266 National Press Bldg.,
Washington D. C., July 11, 1933.

Seventy-Third Congress, 1st Session

THE first session of the Seventy-Third Congress, convened March 9 and adjourned June 16. There were 72 actual days in the session. The total number of laws passed was 105, the total number of bills and resolutions introduced in the House of Representatives was 6,558, and the total number introduced in the Senate was 2,127.

The President transmitted to the House of Representatives twenty-two messages.

Only one measure failed to become a law by a pocket veto, viz: H. R. 3344, to amend Sec. 14, subdivision 3 of the Federal Farm Loan Act, presented to the President June 15.

All proposed legislation retains the status reached on the day of final adjournment.

Among the laws enacted at the present session were the following:

1. To provide relief in the existing national emergency in banking, and for other purposes. Approved March 9, 1933. Public Law No. 1.

2. To maintain the credit of the United States Government. Approved March 20, 1933. Public Law No. 2.

3. To provide revenue by the taxation of certain non-intoxicating liquor, and for other purposes. Approved March 22, 1933. Public Law No. 3.

4. To relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks and for other purposes. Approved May 12, 1933. Public Law No. 10.

5. To extend the gasoline tax for 1 year, to modify postage rates on mail matter, and for other

purposes. Approved June 16, 1933. Public Law No. 73.

6. To improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes. Approved May 18, 1933. Public Law No. 17.

7. To amend section 289 of the Criminal Code. Approved June 15, 1933. Public Law No. 62. (Making State laws in force January 1, 1933, applicable to offenses committed on Federal land within such state.)

8. To amend the probation law. Approved June 16, 1933. Public Law No. 74.

9. To provide emergency relief with respect to home mortgage indebtedness, to finance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States, and for other purposes. Approved June 13, 1933. Public Law No. 43.

10. To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes. Approved May 27, 1933. Public Law No. 22.

11. To provide for the safer and more effective use of the assets of banks, to regulate interbank control, to prevent the undue diversion of funds into speculative operations, and for other purposes. Approved June 16, 1933. Public Law No. 66.

12. To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes. Approved June 16, 1933. Public Law No. 67.

13. To provide for organizations within the Farm Credit Administration to make loans for the production and marketing of agricultural products, to amend the Federal Farm Loan Act, to amend the Agricultural Marketing Act, to provide a market for obligations of the United States, and for other purposes. Approved June 16, 1933. Public Law No. 75.

14. Providing for the suspension of annual assessment work on mining claims held by location in the United States and Alaska. Approved May 18, 1933. Public Law No. 18.

15. For the relief of unemployment through the performance of useful public work, and for other purposes. Approved March 31, 1933. Public Law No. 5.

16. To remove the limitation on the filling of the vacancy in the office of senior circuit judge for the ninth judicial circuit. Approved June 16, 1933. Public Law No. 79.

17. To provide for the survival of certain actions in favor of the United States. Approved June 16, 1933. Public Law No. 80.

18. To authorize the Reconstruction Finance Corporation to subscribe for preferred stock and purchase the capital notes of insurance companies, and for other purposes. Approved June 10, 1933. Public Law No. 35.

19. To relieve the existing national emergency in relation to interstate railroad transportation, and to amend secs. 5, 15a, and 19a of the Interstate Commerce Act, as amended. Approved June 16, 1933. Public Law No. 68.

20. To amend section 1025 of the Revised Statutes of the United States relating to the validity of indictments. Approved May 18, 1933. Public Law No. 16.

21. To amend the Reconstruction Finance Corporation Act, as amended, to provide for loans to closed building and loan associations. Approved June 14, 1933. Public Law No. 51.

Emergency Railroad Transportation Act, 1933

Under Public Law No. 68, the office of Federal Coordinator of Transportation was created, in order to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of transportation. The act is to be in effect for one year unless extended by proclamation of the President for one year. The President appointed Joseph B. Eastman, a member of the Interstate Commerce Commission, as Federal Coordinator.

The railroads have been divided into an eastern, southern and western group and the act provides for three regional coordinating committees, each consisting of five regular and two special members.

The purposes of the act are (1) to encourage and promote or require action on the part of the carriers and of subsidiaries subject to the Interstate Commerce Act, to (a) avoid unnecessary duplication of services and facilities (b) control allowances, accessorial services and charges therefor and (c) avoid other wastes and preventable expense; (2) promote financial reorganization of the carriers and (3) provide for the immediate study of other means of improving conditions surrounding transportation in all its forms and the preparation of plans therefor.

Orders issued by the Coordinator become effective not less than twenty days from publication and remain in effect until vacated by him or suspended or set aside by the Commission on petition filed by any interested party asking that such order be reviewed and suspended pending review. Such petitions are governed by the rules of the Commission.

The carriers or subsidiaries subject to the Interstate Commerce Act as amended, affected by any order of the Coordinator or Commission, so long as such order is in effect, are relieved from the operation of the anti-trust laws and all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, in so far as may be necessary to enable them to do anything authorized or required by such order, but not amending or suspending the Railway Labor Act.

Title II of the Act makes certain amendments to the Interstate Commerce Act to make lawful, on approval and authorization of the Commission, consolidations and mergers of carriers. This title also repeals the recapture provisions of the Interstate Commerce Act and sets up a new rule for rate making.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

SPECIAL MEETING OF BAR ASSOCIATION REPRESENTATIVES

The special meeting of bar association representatives called by President Martin in connection with the Annual Meeting is full of potentialities. The meeting is a step in presenting for the first time a nation wide program for the work of the organized bar. The American Bar Association has heard debated over and over again the problem of uniting the bar associations, national, state and regional, into some sort of centralized or affiliated organization similar to those already achieved by the other great professions. For several years, Special Committees both of the American Bar Association and of the Conference of Bar Delegates have been struggling with the problem. The discussion has always centered about reforms of mechanism or organization which would facilitate a national coordination.

There are, however, more than one thousand societies of lawyers in the United States. Only one of them is really national in scope and purpose—the American Bar Association. Many are state societies and still others represent county, city, regional or even selected groups. They exhibit every variety of activity, scope and tradition. The state associations are unfortunately in many cases the least active and most loosely organized. The means of integrating these professional societies with all of their inevitable differences in type, objects and local interest are not easily found. The conservatism and resistance to experiment so characteristic of the legal profession has been another special problem. A few steps have been taken inside the organization of the American Bar Association to facilitate contact with the state and local bars, such as the election of Vice-Presidents to represent judicial circuits and the modification of the means of selecting members of the General Council and the extension of their tenure of office.

The new project turns aside from these problems of form or machinery and thrusts directly to the end instead of at the means. The plan is to undertake a general program of work by all the active associations on a few selected topics for the coming year and thus to test whether some unification of work and purpose can be obtained without surmounting the hurdles of mere organization. The plan is interesting and full of possibilities. If there is in the bar a sentiment already developed for nation-wide discussion and expression on professional topics, that sentiment may through this program carry us rapidly past the difficulties of organization. If the sentiment is still undeveloped the lawyer is more provincial and backward in the trends of the time than most of our leaders are willing to concede.

BAR OVERCROWDING AND ADMISSIONS

A direct limitation of the number of admissions to the Bar, to relieve the overcrowded condition of the profession, was seriously proposed by a special committee of the Pennsylvania State Bar Association at its recent meeting, but was overwhelmingly rejected. The principle, however, appears to have been actually adopted in three counties of that state, which, we are told in the July issue of "Notes on Legal Education," have a quota system and will admit only a certain number of lawyers per year. We are also told that the plan has been discussed in other jurisdictions.

In times like these, when economic conditions are so difficult for all and for the professions in particular, it is not strange that such a proposal should be put forward. It seems to promise a solution of the overcrowded condition of the Bar more quickly than could be expected from the methods now being pursued. It is also in line with a present tendency to immediate and direct action. But it unfortunately seeks to attain its objective by a transfer of emphasis from the necessity of better qualifications, educational and moral, for those who want to be

admitted, to the necessity of a better living for those already admitted. Desirable as the latter may be, it is not likely to be accepted as a controlling consideration by the profession, and if it were, the effect on public opinion, to which the Bar is appealing today more than ever, would unquestionably be bad.

Of course, it may be argued with a good deal of justice that an overcrowded Bar means that the stress of competition will lead to unethical and unprofessional practices on the part of certain members, who would otherwise be likely to respect accepted standards. The argument for a limitation on the ground of mere numbers can thus be given its own ethical aspect. It can also be argued, not without reason, that a limitation of admissions to a certain number deemed desirable each year does not preclude an insistence on the highest educational and moral qualifications. But it certainly transfers the emphasis, in determining the matter of admissions, from those qualifications to the economic needs of the Bar as at present constituted.

In a recent open letter to the Law Alumni of the University of Illinois, Dean Harno, of the Law School of that institution, states very clearly what we regard as a sound attitude toward this question of overcrowding and admissions. He does it by making the public interest the controlling principle of his argument. He says:

"Let us assume that there are too many lawyers. Important questions are still unanswered. Have not all lines of human endeavor become overcrowded? And is the legal profession justified in raising its voice higher in protest than other professions, than industry, than business?

"It has been said that an overcrowded Bar is detrimental to the public interest. This may be true, yet is the public to be more concerned about an overcrowded Bar than it is about overcrowded farms, trades and industries? If we are to restrict numbers in the legal profession we must find a public concern other than that incident to mere conditions of overcrowding. This feature has not received the stress it deserves.

"What then is the situation relative to the Bar? Does it present any characteristics which make it a peculiar public concern? I believe it does. Inherently the lawyer deals with the problems of others. These problems involve matters of trust and confidence. Also, responsibility falls on him to shape and develop the law, and all people are concerned in that process. It is distinctly to the interest of the public that such duties be intrusted only to persons of high character and integrity and who have in addition first-rate training and ability.

"What is to the public interest, therefore, is not a restricted Bar to benefit members of the profession, but a Bar personnel which is qualified through demonstrated mental capacity and through attributes of character to accept commissions of trust and confidence and to undertake the responsibilities of leadership in public affairs. And it is the responsibility of a law school to present only such individuals as candidates for the profession."

A pertinent contribution to the subject, and a suggestion of a sounder if a slower process of meeting conditions, is found in the July issue of "Notes on Legal Education" referred to above. It contains a comparison of the way in which the medical and legal professions have dealt with the question of admissions and a brief statement of the results obtained.

The medical profession has limited the number of admissions by insisting on and securing much higher educational standards than are required for those admitted to the Bar. Two years of college work are required before the beginning of medical study in thirty-nine states and the District of Columbia. Furthermore, in thirty-eight states, in order to take the examination for a doctor's license, the candidates must be graduates of a school approved by the American Medical Association. It is this graduation from the best type of medical school rather than the state examination for a license on which the medical profession relies to help solve its problems. And not in vain, as the following extract from the article shows:

"Despite the wide increase in the facilities for general education during the last thirty years, the number of new applicants admitted to the medical profession annually during this period has not increased."

We agree with the conclusion of the article that attention should be centered, not on plans for arbitrary limitation, but on the methods which have been so successful in the medical profession.

REVIEW OF RECENT SUPREME COURT DECISIONS

Payments Made by Debtor to Attorney in Contemplation of the Filing of a Petition in Bankruptcy by or against the Debtor Must Be Reexamined by Court on Petition of Trustee or Any Creditor—Excessive Salaries and Bonus Payments to Officers of Corporation—Discharge on Habeas Corpus of Person Held on Warrant of Extradition as Fugitive from Justice—Application of Workmen's Compensation Act to Injuries Sustained in Another State—Inherent Limitations of Federal Judge's Prerogative to Comment on Evidence to Jury—Section 780, 28 U. S. C., Providing for Substitution of Successor of Officer in Certain Proceedings, Not Applicable to Suit against State Officer Who Has Not Adopted Attitude of Predecessor, etc.

By Edgar Bronson Tolman*

Bankruptcy—Section 60 (d)—Reexamination of Attorney's Fees

Under Section 60 (d) of the Bankruptcy Act payments, for services to be rendered, made by a debtor to an attorney in contemplation of the filing of a petition in bankruptcy by or against the debtor, must be reexamined by the court on petition of the trustee or any creditor and are valid only to the extent of a reasonable value to be determined by the court.

Conrad, Rubin & Lesser v. Pender, Adv. Op. 1000: Sup. Ct. Rep. Vol. 53, p. 703; 23 Am. B. R. (N. S.) 1.

This opinion dealt with an order directing certain attorneys to turn over to the trustee in bankruptcy $2,000 of $2,500 which they had received from the bankrupt corporation for legal services rendered shortly before the filing of an involuntary petition. The order was made by a referee in bankruptcy under Section 60 (d) of the Bankruptcy Act; both the District Court and Circuit Court of Appeals sustained the order. On certiorari it was affirmed by the Supreme Court in an opinion by the Chief Justice.

The only question presented related to the jurisdiction of the referee to reexamine the payment under Section 60 (d). In disposing of this the facts were briefly reviewed to determine whether the payment was made in contemplation of bankruptcy. It appeared that the payment had been made but 12 days prior to the filing of the petition at a time when the corporation was in financial difficulties and unable to meet its maturing obligations. One of the attorneys testified at an examination under Section 21a that he was employed to negotiate a 50% cash settlement with creditors. By affidavit he stated that the most extreme course in contemplation was to continue the business under an equity receivership, if it could not be carried on under supervision of a committee of creditors or a representative of the New York Creditors' Adjustment Bureau, Inc. Within two weeks prior to the filing of the petition the bankrupt's president withdrew from the corporation $1,500 and his brother, an employee, withdrew $750.

Holding that the referee had jurisdiction, the learned Chief Justice pointed out that Section 60 (d) is distinguished from other sections relating to cases of preferences and fraudulent conveyances, and those concerning priority of fees in the course of administration, etc. As to Section 60 (d) he said:

> That provision has been held to be *sui generis.* It does not contemplate a plenary suit, but a summary proceeding. . . . The class of cases to which it refers is not that of preferences or of fraudulent conveyances. The provision authorizes re-examination of payments or transfers when made by a debtor (1) "in contemplation of the filing of a petition by or against him," (2) "to an attorney and counselor at law, solicitor in equity, or proctor in admiralty," and (3) "for services to be rendered." Such payments or transfers are only to "be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

The Chief Justice made brief reference to the provisions and purpose of section 64 b (3) concerning attorneys fees for salary rendered after the filing of the bankruptcy petition and added:

> Section 60 (d), authorizing a reexamination of payments and transfers by the bankrupt for services to be rendered, has a broader scope. It contains no intimation of an intention to limit the jurisdiction to reexamine to a particular sort of legal services for the payment of which the debtor has disposed of his property. The point of the provision conferring jurisdiction for a summary reexamination is not the specific nature of the legal services to be rendered but that the payment or transfer to provide for them is made "in contemplation" of bankruptcy. The purpose is shown by the sweeping description of payments or transfers "to an attorney and counselor at law, solicitor in equity, or proctor in admiralty."
>
> We agree with the Court of Appeals that the criteria of jurisdiction to reexamine are distinct from the criteria of the decision on the merits. As to the jurisdiction to reexamine, the controlling question is with respect to the state of mind of the debtor and whether the thought of bankruptcy was the impelling cause of the transaction. . . . If the payment or transfer was thus motivated, it may be reexamined and its reasonableness be determined. Undoubtedly, while the question thus relates to the debtor's motive, the nature of the services which he seeks and for which he pays may be taken into consideration as it may throw light upon his motive. It is not impossible that the services may have been so wholly separate from any exigency of bankruptcy as to indicate that the thought of bankruptcy was in no sense controlling. But, given the fact that the payment or transfer was in contemplation of bankruptcy, the inducement of the transaction affords, from the standpoint of the statute, sufficient ground for

*Assisted by James L. Homire.

authorizing a summary inquiry into its reasonableness. The manifest purpose of the provision is to safeguard the assets of those who are acting in contemplation of bankruptcy, so that these assets may be brought quickly and without unnecessary expense into the hands of the trustee, and to provide a restraint upon opportunities to make an unreasonable disposition of property through arrangement for excessive payments for prospective legal services.

In conclusion, the Court noted the contention that the fact that the petitioners were engaged to negotiate settlement and in the hope that the business could be continued and restored to a sound basis established that the payment was not in contemplation of bankruptcy. Rejecting this contention, the Court said:

> We find no ground for saying that the fact that such purposes were in view establishes, as matter of law, that the payment was not in contemplation of bankruptcy. On the contrary, negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of the payment. "A man is usually very much in contemplation of a result which he employs counsel to avoid."

The case was argued by Mr. Samuel Rubin for the petitioners and by Mr. George C. Levin for the respondent.

Corporations—By-Laws—Officers. Salaries and Bonus Payments

The stockholders' delegation of power to directors to make by-laws, pursuant to statute, does not divest the stockholders of their statutory power to adopt by-laws, in the absence of a statutory provision clearly disclosing that delegation of such power to the directors shall have that effect.

Majority stockholders of a corporation have no power to award to officers of the corporation bonus payments and salaries so large as to amount to spoliation or waste of the corporate property.

Rogers v. Hill, et al., Adv. Op. 945; Sup. Ct. Rep. Vol. 53, p. 731.

The petitioner, a stockholder of the American Tobacco Company, brought suit in the New York Supreme Court against the president and two vice-presidents of that company for certain payments which they have received from the company. The suit was removed to the Federal District Court for Southern New York and was later consolidated with a suit brought in the District Court against another vice-president. The plaintiff maintained that by-law XII of the company, authorizing certain payments to the officers in addition to their salaries, was invalid. The additional payments are based on the company's earnings. The amounts paid under the by-laws since 1921 are set forth in the opinion, and show a payment for the year 1930 to the president of $842,507.72, and $409,495.25 to each of two vice-presidents, in addition to substantial fixed salaries and "cash credits."

On the plantiff's motion for judgment on the pleadings, the District Court granted a temporary injunction against further payments, but decided no other issue. This the Circuit Court of Appeals reversed and remanded the case for proceedings in accordance with its decision. Thereupon the District Court vacated the injunction and dismissed the complaint on the merits. This the Circuit Court of Appeals affirmed.

The respondents contended that the only question open was whether the first mandate of the Circuit Court of Appeals had directed a dismissal of the complaint, since no application for certiorari had been made within three months after the first appeal was decided. As to this, the Supreme Court, in an opinion by MR. JUSTICE BUTLER, concluded that no dismissal was ordered on the first appeal.

> In any view of the matter, it is clear that the decree of the appellate court was not final and that plaintiff, in order to have the validity of the payments considered here, was not bound within three months after entry to petition this court for a writ of certiorari.

The Court then discussed certain questions affecting the merits of the case. The first was whether the stockholders, by reason of their having by charter delegated to the directors authority to adopt by-laws, were without power to adopt by-law XII authorizing the challenged payments. Rejecting the petitioner's contention that this delegation of power to the directors rendered by-law XII invalid and payments made under it wrongful, MR. JUSTICE BUTLER said:

> The charter empowers the directors to make and alter by-laws. But plaintiff argues that the stockholders having delegated to the directors authority to adopt by-laws lost the power to adopt the one in question. That is inconsistent with the purpose of the statute. Power to prescribe rules for the government of business corporations reasonably is deemed an incident of ownership and the voting power of the shares. It is quite generally conferred by statute or charter provisions upon the stockholders. Here the statutory grant to them is plenary. The charter provision is subordinate and not inconsistent. There are many thousand holders of shares of this corporation. Their annual meetings are the only regular ones, but the directors meet frequently. The company's business is extensive and complex and considerations of convenience may have suggested delegation to directors of authority to make and alter by-laws.
>
> That the statute did not intend to divest stockholders is clear for it expressly makes by-laws passed by directors subject to alteration and repeal by the stockholders. In the absence of statutory provision definitely and clearly disclosing that intention, a charter provision or by law adopted by incorporators or shareholders delegating power to directors may not reasonably be held to take from the stockholders any of the power conferred upon them by the statute. Plaintiff's contention would leave the stockholders full power to alter and repeal by-laws made by directors but would deny them power to originate or adopt any by-law or to amend or repeal those made by themselves. We find no reason in support of that construction. Moreover, it seems in direct conflict with the decision of the highest court of New Jersey.

The Court concluded, however, that the validity of the by-law when adopted did not necessarily justify payments so large as to constitute spoliation or waste of corporate assets against the protest of a shareholder. As to this aspect of the case MR. JUSTICE BUTLER said:

> The only payments that plaintiff by this suit seeks to have restored to the company are the payments made to the individual defendants under the by-law.
>
> We come to consider whether these amounts are subject to examination and revision in the district court. As the amounts payable depend upon the gains of the business, the specified percentages are not *per se* unreasonable. The by-law was adopted in 1912 by an almost unanimous vote of the shares represented at the annual meeting and presumably the stockholders supporting the measure acted in good faith and according to their best judgment. The tabular statement in the margin shows the payments to individual defendants under the by-law. Plaintiff does not complain of any made prior to 1921. Regard is to be had to the enormous increase of the company's profits in recent years. The 2½ per cent. yielded President Hill $447,870.30 in 1929 and $842,507.72 in 1930. The 1½ per cent. yielded to each of the vice-presidents, Neiley and Riggio, $115,-141.86 in 1929 and $409,495.25 in 1930 and for these years payments under the by-law were in addition to the cash credits and fixed salaries shown in the statement.
>
> While the amounts produced by the application of the prescribed percentages give rise to no inference of actual or constructive fraud, the payments under the by-law have by reason of increase of profits become so large as to war-

rant investigation in equity in the interest of the company. Much weight is to be given to the action of the stockholders, and the by-law is supported by the presumption of regularity and continuity. But the rule prescribed by it cannot, against the protest of a shareholder, be used to justify payments of sums as salaries so large as in substance and effect to amount to spoliation or waste of corporate property. The dissenting opinion of Judge Swan indicates the applicable rule: "If a bonus payment has no relation to the value of services for which it is given, it is in reality a gift in part and the majority stockholders have no power to give away corporate property against the protest of the minority." The facts alleged by the plaintiff are sufficient to require that the district court, upon a consideration of all the relevant facts brought forward by the parties, determine whether and to what extent payments to the individual defendants under the by-laws constitute misuse and waste of the money of the corporation.

The case was remanded with directions to reinstate the decree granting the injunction *pendente lite*, and for further proceedings in conformity with the opinion.

MR. JUSTICE ROBERTS took no part in the consideration or decision of the case.

The case was argued by Mr. Richard Reid Rogers for the petitioner and by Mr. Nathan L. Miller for the respondents.

Criminal Law—Extradition—Habeas Corpus

A person held in custody on a warrant of extradition as a fugitive from justice should not, on a habeas corpus proceeding, be discharged on mere conflict of testimony. Such person, seeking release on the alibi that he was absent from the state demanding his extradition, should be discharged from custody only on clear and satisfactory evidence of his absence from such state at the time and place of the alleged crime.

South Carolina v. Bailey, Adv. Op. 875; Sup. Ct. Rep. Vol. 53, p. 667.

The respondent was charged with murder of a policeman in South Carolina. On demand of South Carolina the Governor of North Carolina had the respondent arrested as a fugitive from justice. A habeas corpus proceeding was brought in a state court of North Carolina, and thirty or more persons gave testimony and a number of affidavits were presented. At the conclusion of the testimony the trial court said:

> "Gentlemen, I think there has been an issue raised here, I don't think I have a right to pass on, that of identity, and at the same time I don't think it would be fair to the defendant to send him to South Carolina to stand a trial, as it would be very expensive to him and his folks; under the testimony I don't think there would be a jury anywhere that would ever find him guilty beyond a reasonable doubt. I shall, therefore, discharge him under the writ and let him go."

The Supreme Court of North Carolina affirmed the judgment releasing Bailey, and said, in part:

> "Exercising the power delegated by statute and supported in principle by the decisions of this state, the hearing judge found certain facts and set them forth in his judgment. The last inquiry in the solution of the appeal is: What is the effect of the findings of fact set out in the judgment? Whatever may be the variable conclusions reached by other courts, that inquiry is settled in North Carolina. The law is thus stated: 'The findings of fact made by the judge of the Superior Court, found as they are upon competent evidence, are also conclusive on us, and we must therefore base our judgment upon his findings, which amply sustain his order.'"

On certiorari the Supreme Court, in an opinion by MR. JUSTICE MCREYNOLDS, reviewed the evidence and concluded that it failed to overcome the presumption that Bailey was in lawful custody. As to the evidence the Court observed that while the testimony and affidavits given in Bailey's behalf tended to support his claim of absence from South Carolina at the time and place of the alleged crime, it was significant that neither Bailey nor several other persons, who could probably have thrown much light on the issue, testified. Neither were they accounted for. On the other hand, three witnesses for South Carolina identified Bailey as the person who shot the victim. In view of the conflict in testimony the Court found that under a proper application of the law Bailey should have been kept in custody and delivered to the proper authorities in South Carolina.

> The record presents an irreconcilable conflict of evidence. It is not possible to say with certainty where the truth lies.
>
> The rights of the parties depend upon the proper construction and application of Art. IV, Sec. 2, par. 2, of the Federal Constitution and Sec. 5278, Rev. Stat. (U. S. Code, Tit. 18, Sec. 662) derived from the Act of February 12, 1793.
>
> The demanding State asserted a right to the custody of the respondent under the Federal Constitution and statute. He claimed that these impliedly forbade his surrender since the evidence made it clear that he was beyond the limits of South Carolina at the time of the homicide and, therefore, was not a fugitive from the justice of that State.
>
> These questions of federal right were properly submitted for consideration by the State court upon the return to the writ of habeas corpus. And it was the duty of that court to administer the law prescribed by the Constitution and statute of the United States, as construed by this Court. . . .
>
> In effect the matter for determination was whether the accused appeared to be held contrary to the Federal Constitution and laws. The ultimate question of his guilt or innocence of the charge of murder preferred against him did not arise—the sole point for decision related to his absence from the State of South Carolina at the time of the crime. It was wholly beyond the province of the judge to speculate, as he seems to have done, concerning the probable outcome of any trial which might follow rendition to the demanding State. The circumstances require this Court to search the record and determine for ourselves whether upon the facts presented the courts below reached the proper conclusion.
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> * * *
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> Considering the Constitution and statute and the declarations of this Court, we may not properly approve the discharge of the respondent unless it appears from the record that he succeeded in showing by clear and satisfactory evidence that he was outside the limits of South Carolina at the time of the homicide. Stated otherwise, he should not have been released unless it appeared beyond reasonable doubt that he was without the State of South Carolina when the alleged offense was committed and, consequently, could not be a fugitive from her justice.
>
> The record discloses only a conflict of evidence; the requirement which we have indicated has not been met; and the challenged judgment must be reversed.

MR. JUSTICE BRANDEIS and MR. JUSTICE BUTLER were of the opinion that the evidence, while possibly sufficient to sustain, did not require a finding that there was probable cause to believe that the respondent was a fugitive from South Carolina, and that the Court was not warranted in reversing the challenged judgment.

The case was argued by Mr. William C. Wolfe for the State of South Carolina and by Mr. Clyde R. Hoey for the respondent.

Workmen's Compensation Acts—Application to Injuries Sustained in Another State

A state workmen's compensation act, subject to which a contract of employment is made, is not a defense to an action brought to recover compensation under the law of another state in which an injury is sustained by an em-

ployee, unless it is the purpose of the law, under which the contract is made, to exclude recovery in other states.

Ohio v. Chattanooga Boiler & Tank Co., Adv. Op. 872; Sup. Ct. Rep. Vol. 53, p. 663.

This case was before the court under its original jurisdiction, having been commenced by the State of Ohio by an action at law. The State of Ohio sued the defendant to recover $4,910.64 from the defendant, Chattanooga Boiler and Tank Company, a Tennessee corporation, as reimbursement for a sum paid by Ohio to the widow, Mrs. Tidwell, of one of the defendant's employees. The deceased employee was killed while employed by the defendant in constructing a tank at Ironton, Ohio.

An award was made to the widow under the Ohio Workmen's Compensation Act, and upon the defendant's failure to pay the award, it was paid out of the State's insurance fund. In the suit for reimbursement of the State, the defendant's only defense was based on the full faith and credit clause, invoking the rule declared in *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145. That defense had not been set up before the Ohio Commission. The only defense made before the Ohio Commission was that it had no jurisdiction over the case. This was overruled by the Commission.

It was agreed that the employer had no place of business in Ohio, had not qualified to do business there, and had not complied with the Ohio Workmen's Compensation Law. Both the employer and Tidwell were residents of Tennessee where Tidwell entered the employment, though it was a term of the employment that he should serve also in other states; and he had been brought to Ohio to erect a tank fabricated in Tennessee. Tidwell had accepted the provisions of the Tennessee Compensation Act.

Tidwell's widow applied for compensation in Ohio, and later, while the Ohio proceeding was pending, she filed a claim for compensation in Tennessee. The company was successful in defeating the claim in Tennessee on the ground that the widow had irrevocably renounced her rights under the Tennessee Law, by making a claim in Ohio.

Distinguishing the *Clapper case* on the ground that it was intended to preclude recovery elsewhere, the Court, in an opinion by MR. JUSTICE BRANDEIS, gave judgment for the plaintiff. The learned Justice said:

> In the *Clapper* case it was held that the Vermont Workmen's Compensation Act was a defense to an action brought in New Hampshire under the New Hampshire Act to recover for the death in that State of a Vermont resident who had been employed by a Vermont company, pursuant to a contract made in Vermont; because: "It clearly was the purpose of the Vermont Act to preclude any recovery by proceedings brought in another State for injuries received in the course of a Vermont employment." 286 U. S. at 153. The Tennessee Act is different. It is true that it provides that "when an accident happens while the employe is elsewhere than in this State, which would entitle him or his dependents to compensation had it happened in this State, the employe or his dependents shall be entitled to compensation under this act if the contract of employment was made in this State, unless otherwise expressly provided by said contract." Tenn. Code. sec. 6870; and that "the rights and remedies herein granted to an employe subject to this Act on account of personal injury or death by accident shall exclude other rights and remedies of such employe, his personal representative, dependents or next of kin, at common law or otherwise, on account of such injury or death." *Id.*, sec. 6859. But, as construed and applied by the highest court of Tennessee, the statute does not preclude recovery under the law of another State. And the full faith and credit clause does not require that greater effect be given the Tennessee statute elsewhere than is given in the courts of that State. . . .
>
> The decision in *Tidwell v. Chattanooga Boiler & Tank Co.*, 163 Tenn. 420, 648, shows that the provision of the Tennessee law making its remedy an exclusive one is not applicable on the facts here presented. In that case, Mrs. Tidwell brought (while the application in Ohio was pending and before the award) an action in Tennessee to recover compensation under the Tennessee Act. The court held that by bringing the Ohio proceedings the widow had renounced her right under the Tennessee Act; and final judgment was entered for the company shortly before the action at bar was begun. The opinion states that the suit is one upon contract; that "the sole defense interposed is the proceedings in Ohio"; that the institution of the proceedings in Ohio "was a clear renunciation or disaffirmance of the contract"; "that the election thus made was irrevocable, because the petitioner (Mrs. Tidwell) has taken the benefit of the Ohio suit and the defendant (the Company) will doubtless take the detriment of that suit"; and the court added: "Not prejudging another case, but merely by way of answer to argument made in this case, we may observe that defendant's way of escape from the Ohio proceedings and award is not apparent, after the pleading by the defendant of such proceeding and award to defeat its liability herein." In view of this decision, we have no occasion to consider differences in phraseology between tne Tennessee statute and that of Vermont.

The case was argued by Messrs. John H. Bricker and Oscar A. Brown for the plaintiff and by Mr. Francis J. Wright for the defendant.

Trials—Judge's Comment on Evidence—Prejudicial Error

In a trial by jury in a federal court the judge may comment on the evidence and may express his opinion on the facts, provided he makes it clear to the jury that all matters of fact are committed to their determination. This prerogative is vested in the judge by the Federal Constitution, as one of the essential characteristics of trial by jury at common law. Such prerogative is subject to inherent limitations, and for a judge to denounce as a lie the testimony of a defendant in a criminal case, without an analysis of the evidence, is prejudicial error.

Quercia v. United States, Adv. Op. 996; Sup. Ct. Rep. Vol. 53, p. 698.

The petitioner here was convicted in a federal District Court on a charge of violating the Narcotic Act, and the conviction was affirmed by the Circuit Court of Appeals. On certiorari, the judgment was reversed by the Supreme Court, in an opinion by Mr. Chief Justice Hughes, on the ground that the trial court's instructions to the jury and his comment on the evidence were prejudicial to the defendant.

The District Court, after charging the jury with respect to the presumption of innocence and reasonable doubt, told them generally that its expression of opinion as to the evidence was not binding on the jury, and that they were to disregard it, if they did not agree with the Court. The trial judge added:

> "And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.
>
> "Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty."

To this the petitioner took exception.

In holding that this comment was prejudicial error, MR. CHIEF JUSTICE HUGHES discussed the func-

tion of the trial judge and the limitations inherent in his privilege of commenting on the facts, and said:

> In a trial by jury in a Federal Court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. . . . In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. . . . Sir Matthew Hale thus described the function of the trial judge at common law: "Herein he is able, in matters of law emerging upon the evidence, to direct them; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matter of fact: which is a great advantage and light to laymen." . . . Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the Federal courts. . . .
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> This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one-sided"; that "deductions and theories not warranted by the evidence should be studiously avoided. . . . He may not charge the jury "upon a supposed or conjectural state of facts, of which no evidence has been offered." . . . It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf. . . . Thus, a statement in a charge to the jury that "no one who was conscious of innocence would resort to concealment," was regarded as tantamount to saying "that all men who did so were necessarily guilty," and as magnifying and distorting "the proving power of the facts on the subject of the concealment." . . . And the further charge that the proposition that "the wicked flee, when no man pursueth, but the innocent are as bold as a lion," was "a self-evident proposition" which the jury could "take as an axiom and apply it" to the case in hand, was virtually an instruction that flight was conclusive proof of guilt. Such a charge "put every deduction which could be drawn against the accused from the proof of concealment and flight, and omitted or obscured the converse aspect"; it "deprived the jury of the light requisite to safely use these facts as means to the ascertainment of truth." So where the trial judge, in referring to the defendant's story of self-defense, said—"All men would say that. No man created would say otherwise when confronted with such circumstances," this Court held that the comment practically deprived the defendant of the benefit of his testimony. "It was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law." . . . Similarly, where no testimony had been offered as to the previous character of the accused, it was prejudicial error for the trial court to comment unfavorably upon his general character. . . .
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> In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition. Dealing with a mere mannerism of the accused in giving his testimony, the judge put his own experience, with all the weight that could be attached to it, in the scale against the accused. He told the jury that "wiping" one's hands while testifying was "almost always an indication of lying." Why it should be so, he was unable to say, but it was "the fact." He did not review the evidence to assist the jury in reaching the truth, but in a sweeping denunciation repudiated as a lie all that the accused had said in his own behalf which conflicted with the statements of the Government's witnesses. This was error and we cannot doubt that it was highly prejudicial.
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> Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it they should find the defendant not guilty. His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion, was not withdrawn. His characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence. . . .

The case was argued by Mr. Essex S. Abbott for the petitioner, and by Mr. Thomas D. Thacher for the Government.

The Supreme Court—Visitorial Jurisdiction Over Other Federal Courts — Mandamus by State Officer to Compel Dismissal of Action Brought Against Predecessor

Section 780, 28 U. S. C., providing that in proceedings relating to the present or future discharge of the official duties of a public officer the court may substitute the successor of the officer by or against whom the proceeding was originally brought, has no application to a suit against a state officer who has not done or threatened to do the acts of which complaint was made against his predecessor individually.

Ex Parte La Prade, Adv. Op. 860; Sup. Ct. Rep., Vol. 53, p. 682.

This case was before the Court under its original jurisdiction on petition of the Attorney General of Arizona for a writ of mandamus requiring three federal judges, sitting as a specially constituted District Court, to dismiss, as to the petitioner, two suits in equity. The suits, later consolidated, had been commenced by two railroad companies against the petitioner's predecessor in office to enjoin him from prosecuting them under a state statute limiting the length of trains in the state, on the ground that it was in conflict with certain provisions of the Federal Constitution. It was alleged that irreparable injury would result to the railroad companies through the enforcement of penalties, unless the Attorney General were enjoined from enforcing the statute. After certain proceedings and the appointment of a master who recommended a decree in favor of the plaintiffs, the term of the petitioner's predecessor came to an end. Against the petitioner's protest he was substituted by order of the District Court and the suits were continued as to him.

Pointing out that since the suits were based upon threats of the predecessor to enforce an unconstitutional statute, and that there was no allegation that the petitioner was threatening to do likewise, the Court, in an opinion by Mr. Justice Butler, decided that a writ should issue requiring that the suits be dismissed as to the petitioner.

> The injunctions sought are not aimed at the State or the office of attorney general or to restrain exertion of any authority that belongs to either. Each complaint charges that, because of a void enactment and the purpose of defendant under color of his office to enforce it by means of suits which it purports to authorize, plaintiff is prevented from operating trains that are of suitable size and necessary for the proper conduct of the transportation business, and

so continuously suffers great and irreparable injury. The suits were brought against defendant not as a representative of the State but to restrain him individually from, as it is alleged, wrongfully subjecting plaintiff to such unauthorized prosecutions. In *Ex parte Young*, 209 U. S. 123, the court said (p. 159): "The Act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." The principle there stated has since been applied in numerous decisions here. . . .

The laws of Arizona do not authorize substitution of petitioner for his predecessor. . . . The suits abated when defendant Peterson ceased to be attorney general. And unless empowered by sec. 780 the district court is without jurisdiction to direct that petitioner be substituted and that the suits be continued and maintained against him.

The provisions of 28 U. S. C. 780 (a) were cited. They permit the substitution of the successor in office in cases brought against federal public officers. But a distinction was noted between the scope of that section and Section 780 (b) relating to suits against state officers, due to the fact that Congress is not empowered to control the conduct of the latter.

Subdivision (c) extends to all cases covered by (a) and (b). It merely requires that before substitution a non-consenting officer shall be given notice and opportunity to object. It does not prescribe the showing of facts necessary to warrant an order that the proceeding be continued by or against the successor. When construing the section, it is to be borne in mind that Congress has authority to direct the conduct of federal officers in proceedings brought by or against them as such and may ordain that they may sue or be sued as representatives of the United States and stand in judgment on its behalf . . . but that Congress is not so empowered as to state officers. The section is merely permissive; it does not require but merely authorizes the court to order substitution in the cases covered. It extends only to suits "relating to the present or future discharge of . . . official duties." At least as to state officers it does not purport to authorize the imposition of liability or restraint upon the successor on account of anything done or threatened by the predecessor individually.

* * *

It follows from what has been said that sec. 780 has no application to the case as presented and that the district court had no jurisdiction to substitute petitioner as a party defendant in place of his predecessor or to direct that the suits be continued and maintained against him. We have no occasion to decide whether or in what circumstances a successor in office who adopts the attitude of his predecessor and is proceeding or threatening to proceed to enforce the statute may be substituted in a pending suit. That question is not here and is reserved.

The case was argued by Mr. Donald R. Richberg for the petitioner and by Mr. Robert Brennan and Mr. Henley C. Booth for the respondents.

Statutes—Treaties—Foreign Vessels Smuggling Liquors

The treaty between the United States and Great Britain which consented to seizure of British ships offending against the prohibition laws of the United States when within one hour's sailing distance of the coast superseded the Tariff Act of 1930 (reenacting an identical provision of the Act of 1922) as to British vessels and made unlawful the seizure of British hovering vessels beyond one hour's sailing distance.

Cook vs. United States, Adv. Op. 396; Sup. Ct. Rep. Vol. 53, p. 305.

The principal question involved here was whether Sec. 581 of the Tariff Act of 1930, which re-enacted in identical language Sec. 581 of the Tariff Act of 1922, is modified by the 1924 Treaty with Great Britain. The statutory provision authorizes Coast Guard officers to stop and board any vessel within 4 leagues (12 miles) of the coast "to examine the manifest and to inspect, search and examine" the vessel and its merchandise, and to seize the same if it appears that any violation of the law of the United States has been committed rendering the vessel or merchandise liable to forfeiture.

The Treaty of 1924 declares the intention of the two governments to uphold the principle that 3 marine miles extending from the coast line constitute the proper limits of territorial waters. It provides that Great Britain will raise no objection to the boarding of private vessels under the British flag for examination to ascertain whether alcoholic beverages are sought to be imported into the United States, contrary to its laws. It also makes provision for seizure of the vessel, in the event that an offense has been committed or attempted, and for taking it to port for adjudication. The third section of Article II limits the exercise of the rights conferred to the area "that can be traversed in one hour by the vessel suspected of endeavoring to commit the offense."

In the case under review the Mazel Tov, a British vessel of speed not exceeding 10 miles per hour, was boarded by officers of the Coast Guard within 4 leagues of the coast, 11½ miles from the nearest land. The manifest was demanded and exhibited, and an examination of the cargo disclosed that it consisted entirely of unmanifested intoxicating liquor which had been cleared from St. Pierre, a French possession. The vessel was bound ostensibly for Nassau, a British possession, but when boarded, had been cruising off our coast with the intention of delivering the liquor in the United States by other boats. The evidence indicated an intention not to approach nearer than 4 leagues to the coast, and there was no evidence that the vessel had been in communication with our shores and none of the cargo had been unladen. Seizure took place more than 10 miles from the coast, and the officers took the vessel to Providence.

The Collector of Customs imposed a penalty on the Master of the Mazel Tov for failure to include the liquor in the manifest. The vessel and her cargo were both then libeled to collect the penalty.

The District Court dismissed the libels, but on appeal the Circuit Court of Appeals reversed the judgments holding that the Treaty "did not effect a change in the customs-revenue laws of the United States wherein Congress had fixed a four league protective zone." On certiorari this was reversed by the Supreme Court, in an opinion by MR. JUSTICE BRANDEIS.

The petitioner contended that the seizure was unlawful under the Treaty; that the authority conferred by Sec. 581 of the Tariff Act to board, search and seize within the four league limit was modified to substitute the distance of one hour's sailing time for the four league limit; that the re-enactment of Sec. 581 in the Act of 1930 continued in force the modification by the Treaty; and hence the boarding and seizure 11½ miles

from the coast of a vessel with a speed of not more than 10 miles per hour were unlawful.

The Government took the position that the Treaty did not so modify Sec. 581, and that if it did the re-enactment of Sec. 581 removed such modification. The suggestion was made for the Government that the Treaty settled the validity of seizure only in cases within the limits specified in the Treaty, and that since the seizure in question was made beyond one hour's sailing distance the Treaty did not apply. An examination of the history of the Treaty led to the conclusion that it was not the intention of the high contracting parties so to limit its operation. The intention was thus summarized:

> Each country was to secure the immunity required to satisfy its peculiar need. The need of the United States was to be met by providing that His Britannic Majesty "will raise no objection to the boarding," etc., outside the territorial waters at no "greater distance from the coast of the United States than can be traversed in one hour by the vessel suspected of" smuggling. The need of Great Britain was to be met by our allowing "British vessels voyaging to or from the ports or passing through the waters of the United States to have on board alcoholic liquors listed as sea stores or as cargo destined for a foreign port, provided that such liquor is kept under seal while within the jurisdiction of the United States."

The effect of the Treaty as superseding inconsistent provisions of Sec. 581 of the Tariff Act of 1922 and the latter's re-enactment in 1930 was thus described:

> The Treaty, being later in date than the Act of 1922, superseded, so far as inconsistent with the terms of the Act, the authority which had been conferred by § 581 upon officers of the Coast Guard to board, search and seize beyond our territorial waters. . . For in a strict sense the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions.
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> The purpose of the provisions for seizure in § 581, and their practical operation, as an aid in the enforcement of the laws prohibiting alcoholic liquors, leave no doubt that the territorial limitations there established were modified by the Treaty. This conclusion is supported by the course of administrative practice. Shortly after the Treaty took effect, the Treasury Department issued amended instructions for the Coast Guard which pointed out, after reciting the provisions of section 581, that "in cases of special treaties the provisions of those treaties shall be complied with"; and called attention particularly to the recent treaties dealing with the smuggling of intoxicating liquors. The Commandant of the Coast Guard, moreover, was informed in 1927, as the Solicitor General states, that all seizures of British vessels captured in the rum-smuggling trade should be within the terms of the Treaty and that seizing officers should be instructed to produce evidence, not that the vessel was found within the four-league limit, but that she was apprehended within one hour's sailing distance from the coast.
>
> The Treaty was not abrogated by re-enacting 581 in the Tariff Act of 1930 in the identical terms of the Act of 1922. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. . . Here, the contrary appears. The committee reports and the debates upon the Act of 1930, like the re-enacted section itself, make no reference to the Treaty of 1924. Any doubt as to the construction of the section should be deemed resolved by the consistent departmental practice existing before its re-enactment.

The argument that the alleged illegality of the seizure was immaterial in the forfeiture proceedings, since the Government by filing the libels ratified the seizure was rejected, upon the ground that the United States itself lacked power to seize and therefore could not ratify the seizure.

> The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. The Treaty fixes the condition under which a "vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with" the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.

MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER thought that decree of the Circuit Court should have been affirmed for the reason that

> in respect of British vessels engaged in smuggling intoxicating liquor into the United States the treaty of 1924 was not intended to cut down the rights claimed by the United States under the hovering statutes in force since the organization of our government, but that it was the purpose of both countries to extend and enlarge such rights to enable the United States more effectively to enforce its liquor laws.

MR. JUSTICE VAN DEVANTER did not participate in the case.

The case was argued by Messrs. Joseph E. Fitzpatrick and Edmund M. Toland for the petitioner and by Solicitor General Thacher for the respondent.

Correction

An error was made in the July issue of the JOURNAL in giving the names of counsel arguing the case of Wisconsin et al vs. Illinois et al before the U. S. Supreme Court on April 17, 1933. Mr. Raymond T. Jackson argued the case for the States of Wisconsin, Minnesota, Ohio and Michigan; Mr. Cornelius Lynde argued it for the State of Illinois; and Messrs. Joseph B. Fleming and William Rothmann argued it for the Sanitary District of Chicago. The citation to Advance Opinions was mistakenly given as page 279, when it should have been page 882.

Silence as Ground for Divorce

(N. Y. Times, July 24)

Silent wives are said to be at a premium everywhere, but, at least in France, silent husbands have not the same distinction.

Encouraged by the successful termination of a suit brought by a Breton wife on the ground of silence, a Parisienne has lodged a suit on the same grounds. If successful Excelsior expects that the Breton decision will serve as a much-desired precedent all over France.

The Breton wife brought her suit in Rennes. She alleged that for exactly ten years her husband had not spoken a word to her. When she needed money for household expenses, she was expected to place her empty purse on the kitchen table, and he would place in it the necessary cash.

In giving judgment the Rennes court said: "By his voluntary and obstinate silence he maintained an attitude which the court could construe into cruelty. Hence, according to Article 104, Paragraph 6, of the Civil Code a divorce should be granted on the ground of cruelty, and the court therefore grants it."

THE STATUS OF THE PHILIPPINE ISLANDS UNDER THE INDEPENDENCE ACT

Principal Features of Measure Passed over the President's Veto Last January—Questions Relating to Intermediate Period Which Is to Precede Final and Complete Withdrawal of American Sovereignty, in Case Act Is Adopted by Filipinos—The Term "Semi-Sovereign," It Is Believed, Will Properly Characterize Status of Philippines During This Time—Power of Congress to Destroy Same by Repeal of Act Creating It, etc.

By Hon. F. C. Fisher

Formerly Associate Justice of the Supreme Court of the Philippine Islands

IN January, 1933, the Congress of the United States, overriding the President's veto, enacted into law the Hawes-Cutting bill, "To enable the people of the Philippine Islands to adopt a constitution and form a government for the Philippine Islands, to provide for the independence of the same, and for other purposes." The Philippine Independence Act empowers the legislative branch of the present Philippine Government, if the Act is accepted, to provide for the election of delegates to a constitutional convention, to be held within one year, to draft a constitution for the Government of the Commonwealth of the Philippine Islands, subject to certain conditions and qualifications prescribed by the Act.[1] The constitution, when drafted, is to be submitted,[2] within two years from the effective date of the Act, to the President of the United States. If the president finds that the proposed constitution conforms substantially with the provisions of the Act, either as originally prepared or as modified by the constituent convention upon the President's suggestions, he is to certify the fact to the Governor General of the Philippine Islands. Within four months from the time of the approval of the proposed constitution, it is to be submitted to the people of the Philippine Islands[3] for ratification or rejection by the qualified voters. The Philippine Legislature is empowered to prescribe the manner in which the election is to be held, and to canvass the returns. If a majority of the votes cast shall be against the constitution, the existing government is to continue unchanged; but if the majority of the votes shall be in favor of its acceptance, this shall be deemed to be "an expression of the will of the people of the Philippine Islands in favor of Philippine independence"[4] and thereupon the Governor General shall within thirty days order an election to be held to fill the elective offices established by the constitution of the Commonwealth. After the election has been held the result is to be certified by the Governor General to the President of the United States, who will thereupon issue a proclamation,[5] announcing the result of the election. Upon the issuance of this proclamation, the existing Philippine Government is to terminate and the new government is to enter upon the performance of its functions.[6] For a period of at least ten years thereafter, the Commonwealth government is to be carried on, subject to the restrictions upon its power incorporated into its constitution, in accordance with the terms of the Act. Upon the fourth day of July following the expiration of that period the President is required,[7] if the Commonwealth constitution has been previously amended in certain prescribed particulars, to withdraw the sovereignty then exercised by the United States and to recognize the independence of the Philippine Islands "as a separate and self-governing nation."

The Philippine Independence Bill, as reported by the Committee to the Senate,[8] contained a provision by which it was intended to permit the Filipino people, by a plebiscite to be held before the expiration of the intermediate period of years to follow the organization of the Commonwealth government, to determine whether they then desire complete independence or a continuation of the relation with the United States. This provision was eliminated from the bill as finally enacted into law. The purpose was, apparently, to leave the Filipinos no *locus penitentiae* after once having adopted the Commonwealth constitution. A majority of votes in favor of the constitution is to be "deemed an expression of the will of the people of the Philippine Islands in favor of Philippine independence."[9] Nevertheless, the language of the Act is open to the construction that the ultimate severance of the political relationship of the Philippine Commonwealth with the United States will depend upon the determination of the Filipinos. The elements of sovereignty in the Philippines which will be retained by the United States after the adoption of the Commonwealth constitution are not to be divested by the mere lapse of the ten year period. By the terms of the statute, their relinquishment requires an affirmative act by the President of the United States; but the President's authority to withdraw such sovereignty is conditional. His power is made subject to the proviso that before the fourth day of July following the tenth year after the inauguration of the new government the

1. Sec. 1; Sec. 17.
2. Sec. 3.
3. Sec. 4.
4. Sec. 4.
5. Sec. 4.
6. Sec. 4.
7. Sec. 10.
8. Sec. 9, Hawes-Cutting Bill, 72 Cong. 1st Sess. S. Rep. 354.
9. Sec. 4, Phil. Ind. Act.

Commonwealth constitution shall have been amended in the particulars specified[10] in the Act. The adoption and incorporation into the Commonwealth constitution of the required amendments will depend upon the volition of the Filipino people, if it be assumed that the constitution will provide that amendments can be made only by direct action of the electorate. When the time comes to adopt the required amendments it may appear to the people of the Philippine Islands that a continuation of the relation with the United States is to be preferred to complete independence. A popular vote upon the adoption or rejection of the constitutional amendments essential to authorize the President to complete the withdrawal of American sovereignty will be, to all intents and purposes, a determination by plebiscite of the Filipino people of the issue of complete independence. If the result should be the rejection of the proposed amendments the President will have no authority to proclaim and recognize the independence of the Philippine Islands. There is nothing in the Act as it stands to prevent an indefinite prolongation of the relations which will result if the Commonwealth constitution is adopted. Congress, in the Act, apparently assumes that the Filipinos will take the steps necessary, at the end of the ten year period, to accomplish the independence of their country; but there is nothing in the measure which requires them to do so.

If the Act is accepted by the Filipino people, a constitution adopted, and the Commonwealth government set up, what will be the status of the Philippine Islands during the period which must elapse before there can be a final and complete withdrawal of American sovereignty? Will the Islands continue, as heretofore, to be merely unincorporated territory, belonging to but not a part of the United States, or will the Commonwealth be a state capable of entering into relations with other members of the society of nations?

There is much discussion in the writings of authorities on international law concerning the qualifications which must be possessed by a political organization to entitle it to the status of a state. The consensus of opinion, it is believed, warrants the conclusion that the essential qualifications are that there must be a people, permanently occupying a fixed territory, bound together by common laws into one body politic with an organized government exercising powers within the territory, and capable of entering into relations with other states.[11]

The inhabitants of the Philippine Islands under the proposed Commonwealth government will unquestionably be a people, occupying a fixed territory, with an organized government created with their express consent; but will they, as a political entity, be capable of entering into relations with other states?

The Act of Congress which empowers the people of the Philippine Islands to adopt a constitution for their government requires that it be provided therein[12] that "Foreign affairs shall be under the direct supervision and control of the United States."

It is obvious, therefore, that during the intermediate period to precede final and complete independence the Philippine Commonwealth government will not possess the power, through the independent action of any treaty-making instrumentalities of its own, to enter into direct relations with other powers. Nevertheless, the wording of the Act seems clearly to imply that the Commonwealth may have "foreign affairs." The fact that such "foreign affairs" are to be under *supervision* and *control* of the United States would not make them, if permitted, the foreign affairs of the supervising and controlling power. It is quite possible that during the intermediate period occasions may arise in which it would be greatly to the advantage of the Commonwealth to enter into treaty relations with foreign states with respect to matters of no direct concern to the United States. Trade relations between the Philippine Commonwealth and the United States are to be governed[13] by Congressional legislation; but the legislature of the Commonwealth, subject to the approval of the President of the United States, will have the power to enact tariff laws applicable to its trade with other countries.[14] As one of the principal reasons for the postponement of complete independence and of the cessation of the present privileged access of Philippine products to the markets of the United States is to give the new nation an opportunity to seek markets elsewhere, it is quite likely that many changes in Philippine tariffs will be found needful during the preparatory period. Agreements between the Commonwealth and its neighbors in the Far East for reciprocal tariff concessions might require the negotiation of treaties. The migration of aliens into the Islands is another matter which might require such treatment. At present the American laws relating to the exclusion of Chinese are applicable to the Philippines;[15] but the Commonwealth might find itself hampered in an effort to develop its trade with China were this policy to remain unchanged. The Act clearly contemplates that the Commonwealth may have occasion, and that its legislature will have the power, to enact new laws concerning immigration, although its acts on this subject will, during the transitional period, be subject to the approval of the President of the United States.[16] But tariff concessions by China might be conditioned by the requirement of a definite undertaking on the part of the Commonwealth government to modify the existing laws regarding immigration of Chinese nationals into its territory, and agreement on the subject might properly be embodied in a treaty. Such agreements would be matters pertaining to the "foreign affairs" of the Commonwealth. Their negotiation and conclusion would of necessity[17] be under the "direct supervision and control of the United States," but the resulting obligations, which might long outlive the intermediate period, would be those of the Commonwealth.

The wording of the Act with regard to the foreign affairs of the Commonwealth is extremely significant. The exercise of "supervision" and of "control" implies that the initiative rests with the supervised and controlled entity. It must be taken to relate to a function which would otherwise be un-

10. Sec. 4.
11. Hyde, Int. Law, Vol. I, p. 7; Moore, Int. Law Digest, Vol. I, pp. 14-21.
12. Sec. 2 (j)
13. Sec. 6.
14. Sec. 2 (i).
15. Act of Congress of April 29, 1902; 37 Stat. 176.
16. Sec. 2 (i).
17. Sec. 2 (j).

trammeled. The United States may supervise and control the foreign affairs of other states; but these terms, as applied to the direction of its own foreign affairs, would be wholly inappropriate. It is believed, therefore, that the wording of the Act justifies the inference that Congress contemplated and intended that the Commonwealth of the Philippines should be an entity capable, under the guidance of the United States, of entering into relations with the outside world.

It is obvious, of course, that the Philippine Commonwealth, during the transitional period, will not be an independent state, for although possessed of the capacity to enter into foreign relations, the exercise of the power to deal with the outside world will not be free from external restraint. But it is not essential that the exercise of such power be uncontrolled if the capacity[18] to maintain foreign relations is present. Cuba is unquestionably a state of international law; but by the terms of the Platt Amendment, incorporated into an Appendix to its constitution[19] at the behest of the United States and embodied in the Permanent Treaty of May 22, 1903,[20] its government is deprived of the power to enter into any treaty or compact with any foreign power

"which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island."

Egypt, because of its relations with Turkey as its suzerain prior to the establishment of the British Protectorate in 1914, was subjected to the control of the dominant state in the exercise of its treaty-making power.[21] Other instances might be cited of countries which, though possessed of the status of states of international law are or have been subjected to external control with respect to their foreign relations.[22] Such states, which "maintain international relations to a greater or less extent, according to the decree of their independence" are generally called semi-sovereign.[23] This term, it is believed, may properly be used to characterize the status which will be possessed by the Philippines under the Commonwealth during the intermediate period, unless it is found from an examination of the Act as a whole that the implication of the provision concerning foreign affairs is overcome. The restrictions which by the terms of the Act must be written into the constitution of the Commonwealth impose many limitations upon its powers. Perhaps the most important of these are the recognition of the right of intervention by the United States for the protection of life, liberty and property;[24] the limitation of the power to incur indebtedness;[25] the recognition of the power of the United States to administer the customs in the event of default in payment of the public debts;[26] and the negative control vested in the President of the United States over acts of the Commonwealth legislature relating to currency, coinage, imports, exports and immigration.[27]

The wording of the intervention provision[28] is substantially the same as that of the Platt Amendment concerning Cuba, incorporated into Art. III[29] of the Appendix to the Cuban Constitution. It will readily be conceded that this limitation upon complete independence is not incompatible with the existence of a state.[30] Indeed, the use of the word "intervene" in the Act may be regarded as of some significance. Intervention is the term used by writers on international law to designate the action, which may or may not be lawful, by which one State interferes in the domestic or foreign affairs of another. The term is one which can never properly be used to designate the exercise of power by a state in its own territory to protect life, liberty or property.[31] If it had been the intention of Congress that during the intermediate period the status of the Philippines under the Commonwealth constitutional government should continue to be that of territory belonging to the United States, it would have been superfluous to require the Commonweath in its constitution to recognize the right of the United States to maintain order in the Islands.

The limitation upon the power of the Commonwealth to contract indebtedness[32] also has its counterpart in the Platt Amendment and in Art. II of the Appendix of the Cuban Constitution. Should the Commonwealth, during the transitional period, default in the payment of its debts, and the High Commissioner of the United States take possession of its custom houses, under the authority of the Commonwealth constitution,[33] the situation created would be similar to that which existed in the Dominican Republic[34] and in Haiti[35] under the Receiverships by which the United States, with the consent of those countries, assumed a large degree of control over their fiscal affairs. Such partial subjection to foreign control undoubtedly resulted in restriction of the sovereignty of Santo Domingo and of Haiti, but did not otherwise affect the international status of those countries.

The legislative power of the Commonwealth during the transitional period will be subject to important limitations, to be embodied in the constitution. Laws affecting the currency, coinage, imports, exports and immigration are not to take effect until approved by the President of the United States.[36] The President may "suspend the taking effect" of laws which in his judgment may result in a failure of the Commonwealth to pay its debts or provide for its sinking funds, or impair its currency

18. "It is not necessary for a State to be independent in order to be a State of international law." Westlake, 2 ed. I, 81; see also Moore, Int. Law Digest I, 18; Hyde, Int. Law I, 16.
19. American Constitutions II, 147-8.
20. Malloy's Treaties I, 364.
21. Hyde Int. Law I, 27.
22. (a) *The United Republic of the Ionian Islands.* Hyde, op. cit. I, 25; Hall Int. Law, 4th ed., 30; Moore, op. cit. I, 29; The Ionian Ships, Hudson, Cases on Int. Law, p. 42.
(b) *Monaco.* Treaty with France of July 17, 1918; 111 Brit. and For. State Papers, 727. "Measures concerning the international relations of the Principality shall always be subject to a prior understanding between the Princely government and the French Government."
(c) *Iceland.* Danish Law of Nov. 30, 1918; 111 Brit. and For. State Papers, 702. "Denmark shall attend, on Iceland's behalf, to its foreign affairs."
(d) *Danzig.* Poland-Danzig Convention of Nov. 9, 1920; Hudson, Case on Int. Law, 39. "Poland shall undertake the conduct of the foreign relations of the Free City of Danzig as well as the protection of its nationals abroad."
23. Moore, op. cit. I, p. 18.
24. Sec. 2(n).
25. Sec. 2(o) and Sec. 7 (4).
26. Sec. 2(f).
27. Sec. 2(i).
28. Sec. 2(n).
29. American Constitutions II, pp. 147-8.
30. Hyde, op. cit. I, 27.
31. Hyde, op. cit. I, p. 116.
32. Sec. 2(f).
33. Sec. 2(c) and Sec. 7 (4).
34. Convention of Feb. 8, 1907; Malloy's Treaties I, 418.
35. Treaty of Sept. 16, 1915; 39 Stat. 1654.
36. Sec. 2(l).

reserve, or violate international obligations of the United States.

The wording of the first sentence of Section 15 of the Act[37] might lead to the conclusion that Congress intended to reserve to itself, during the transitional period, the general power to amend or repeal all acts of the legislature of the Commonwealth; although the language used is susceptible of the interpretation that it was intended to apply only to laws now in force and those hereafter enacted up to the time when the legislative powers of the Commonwealth become operative. This view is strengthened by the consideration that the Commonwealth government is to have all the "rights, privileges, powers and duties. . ." conferred by the constitution.[38] The limitations to which the executive, legislative and judicial powers of the Commonwealth government are to be subject are to be expressly stated in the constitution. They are prescribed by Section 2 of the Act. Legislative acts of the Commonwealth which conflict with any of these constitutional limitations will, of course, be nullities; but within the field not restricted by such limitations the Commonwealth legislature will exercise an authority not delegated by Congress but derived directly from the people of the Philippine Islands by their adoption of the constitution. The construction that Congress, without reserving the general power of direct legislation in the territory of the Commonwealth, intended to reserve the power to amend or repeal any or all of the laws constitutionally enacted by the Commonwealth legislature is one which appears to be contrary to the purpose of the Act as a whole and not to be adopted if any other reasonable interpretation of the language of Section 15 is possible. In this connection it is important to bear in mind that the Commonwealth government, even during the transitional period, will not be one of delegated powers, vested only with the authority conferred upon it, expressly or by necessary implication, by its constitution. On the contrary, it will derive directly from the people of the Philippine Islands all the powers of government not withheld by its constitution or the Independence Act. In determining the validity of the acts of its legislature the pertinent enquiry will be whether the particular authority has been *withheld*, not whether it has been *conferred*. The same important distinction exists with respect to the legislative acts of the States of the American Union and those of its Federal government.[39]

Should it be held, however, that the Act confers upon Congress, during the transitional period, the general power of amendment and repeal of the acts of the Commonwealth legislature, such a limitation upon the law-making power, it is believed, would not be incompatible with the possession of the status of semi-sovereignty by the Commonwealth, nothwithstanding its subjection to such external control. The power of the Cuban Republic to legislate in its own territory upon the subject of sanitation is limited by the provisions of Art. V of the Permanent Treaty with the United States.[40] Panama is subject to similar limitations with respect to the sanitation of the cities of Panama and Colon.[41] Haiti, by the Treaty of September 15, 1915, surrendered for the term of the treaty the power to amend its tariff laws without the approval of the President of the United States.[42] These agreements restricted but obviously did not extinguish the sovereignty of these states, as they are not incompatible with the maintenance of foreign relations.

Independence, as Westlake observes, like all negatives, does not admit of degrees.[43] The Philippines, under the Commonwealth government during the intermediate period, will not be independent. But independence, as has been shown, is not essential to the possession and exercise of semi-sovereignty by a political entity subjected to limited external control, not extending to the negation of the capacity to maintain foreign relations. Sovereignty is divisable.[44] If a political entity, while still retaining such capacity, has relations with another power which make it an any degree dependent upon that other "so much of sovereignty as they leave it is a kind or degree of semi-sovereignty."[45]

The purpose of the Philippine Independence Act is the relinquishment of the sovereignty of the United States over the Philippine Islands. Its enactment implies that Congress, under the Constitution, is possessed of the power to accomplish this purpose and, although this assumption has been seriously questioned,[46] it is believed to be warranted.[47] If this view is correct Congress unquestionably could have withdrawn American sovereignty over the Philippines entirely and immediately. Sovereignty being divisible, it must be equally within the power of Congress to effect a present partial relinquishment of sovereignty and to provide for the future surrender of the retained elements of sovereign power. It is to be observed that the Act by its terms contemplates no future action by Congress to accomplish its purpose. Upon the expiration of the intermediate period Philippine sovereignty is to become complete and absolute upon the withdrawal, by presidential proclamation, of all control or sovereignty then exercised in the Islands by the United States. Was it the intention of Congress that the complete and absolute sovereignty of the United States over the Philippine Islands now existing should continue unimpaired until the attainment of complete independence, or do the terms of the Act warrant the conclusion that the purpose of the national legislature was to relinquish part of our sovereignty in favor of the Commonwealth upon the inauguration of the constitutional government and to allow the restricted sovereignty of the Commonwealth to become complete at the end of the preparatory period?

The view that it was intended to make a grant of restricted sovereignty to take effect immediately upon the inauguration of the Commonwealth gov-

37. "Sec. 15. Expect as in this Act otherwise provided, the laws now or hereafter in force in the Philippine Islands shall continue in force in the Commonwealth of the Phillippine Islands until altered, amended or repealed by the Legislature of the Commonwealth of the Philippine Islands or by the Congress of the United States."
38. Sec. 4.
39. C. P. & O. R. R. v. Oto County, 16 Wallace (U. S.) 667.
40. Malloy's Treaties I, 364.
41. Ibid. II, 1347.
42. 39 Stat. 1654.
43. Westlake, Int. Law, 37.
44. Ibid., Int. Law 87; Oppenheim Int. Law (4 ed.) I, 142.
45. Ibid., 87; see also Hyde, Int. Law I, 16, note 4.
46. Williams, D. R., Virginia Law Review, Vol. 12, P. 1; Senator Copeland, Speech in debate on Philippine Independence, Cong. Rec., Vol. 76, pp. 252 et seq.
47. Fisher, F. C., "Constitutional Power of Congress to Withdraw the Sovereignty of the United States over the Philippine Islands." Lawyers Co-operative Publishing Company, Rochester, N. Y., 1932; Cong. Rec., Vol. 75, pp. 14871 et seq.

ernment is strongly supported by those provisions of the Act, already considered, which apparently assume that the Philippine Commonwealth will be a political entity capable of entering into relations with other powers. It is also significant that, with respect to the time during which the specified limitations upon the powers of the Commonwealth are to be in force, the Act provides that they shall be in operation pending the "final and complete" withdrawal of the sovereignty of the United States over the Philippine Islands.[48] This expression is used repeatedly in the Act.[49] The implication is that there will be a *partial* or incomplete relinquishment of sovereignty upon the inauguration of the Philippine Commonwealth, to become *final* and *complete* at the end of the preparatory period. It is true that in Section 9 the declaration is made that the United States shall not be under obligation to pay any debts of the "Government of the Philippine Islands" upon bonds "hereafter issued during the continuance of United States sovereignty in the Philippine Islands"; and this language, standing alone, might be considered to imply that the sovereignty of the United States is to continue unimpaired until the Philippines become completely independent. It is possible, however, that this section was intended to relate to bonds issued hereafter by the existing government, prior to the inauguration of the new constitutional government. The latter, throughout the Act, is designated as "the Government of the Commonwealth of the Philippine Islands."[50] But in any event, the reference to the continuance of sovereignty in Section 9 must be interpreted in connection with the qualification of the word "withdrawal" by the words "final and complete" in other sections, and also in the light of the wording of that part of the Act[51] by which the President is directed, upon the expiration of the intermediate period, to

> "withdraw and surrender all right of possession, supervision, jurisdiction, control or sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands. . . ."

It is to be noted that the relinquishment then to be effected relates to

> "all . . . sovereignty *then* existing and exercised by the United States. . . ."

The use of the word *then*, construed in connection with the words "final and complete" used in the same connection may be taken to indicate an assumption by Congress that the sovereignty which will remain to be relinquished at the end of the intermediate period will be something other than the complete and absolute sovereignty *now* possessed. Otherwise the appropriate direction would be simply that the President should surrender the sovereignty of the United States, without the qualifying words "then existing."

The method adopted by the Congress for bringing the Philippine Commonwealth into being is also extremely significant and important in connection with this enquiry. In all its earlier legislation dealing with the government of the Philippines, Congress has exercised directly its authority to determine the extent and character of the powers to be exercised in the Islands.[52] The insular legislative bodies have exercised delegated authority only. Excutive power was retained by the United States and vested in a governor general appointed by the President. The people of the Philippine Islands were given no choice, by these organic acts, regarding the acceptance or rejection of the governments thereby created. The present Act, strikingly to the contrary, does not undertake to impose any change whatever upon the people of the Islands. It merely *empowers* them to adopt a constitution, if they see fit to do so, and to embody in it, for a limited period, the restrictions enumerated in the Act. The government to be set up under the constitution will not be one created for them, as in the past, by Congress, but one "instituted by the people" of the Islands.[53] Is not the grant to the people of the Philippines of the authority to adopt their own constitution in itself a relinquishment of sovereignty which would have been complete but for the condition of the grant which requires that they shall, in the constitution to be adopted by them, impose the prescribed restrictions upon the powers of the government to be created?

If the Act, if accepted and acted upon by the Filipino people, brings into being a semi-sovereign commonwealth capable of establishing supervised foreign relations and empowered to achieve complete independence in a few years without further legislative action by the controlling power, can Congress, by repealing the enabling Act at any time during the transitional period, abolish the Commonwealth, and destroy the constitutional government set up by its inhabitants within its territory?

Nothing is more firmly established in American constitutional law than the principle that a legislative body cannot enact irrepealable legislation or restrict its own power or the power of its successors to amend or repeal statutes enacted by it.[54] The Act which authorizes the creation of the Commonwealth is clearly a statute.[55] Congress is not subject to the limitation imposed upon the States of the Union by the Federal Constitution with regard to the power to impair contracts or analogous compacts by subsequent legislation;[56] and even had such a limitation been imposed, it is believed that the organization of the Commonwealth government under the Act could not be regarded as creating contractual rights and obligations. It has been established by many decisions that the constitutional prohibition of the impairment of contracts does not affect the power of the legislatures of the States of the American Union to amend or repeal acts creating municipalities, even when the charter has been accepted by vote of the inhabitants of the municipal area.[57]

There is, however, a readily distinguishable difference between the Act here under consideration and statutes enacted to create counties or municipalities. The purpose of statutes creating municipalities is to set up, within the state, appropriate instrumentalities for the exercise of certain powers of the state by groups of persons who form part

48. Sec. 2.
49. Sec. 7; Sec. 10 (3); Sec. 14.
50. Sec. 6, pars. (d) and (e); Sec. 7.
51. Sec. 10.
52. The Philippine Act, Act of Congress of July 2, 1902; The Jones Law, Act of Congress, Aug. 29, 1916.
53. Sec. 10.
54. Statutes, 59 Corpus Juris, 900; Court Law, 12 Corpus Juris 809.
55. A statute is "any enactment from whatever source originating to which a state gives force of law." New Orleans Waterworks Co. v. Louisiana Sugar Refining Company, 125 U. S. 18.
56. Legal Tender Cases, 12 Wallace 457.
57. Mount Pleasant v. Beckwith (1879), 100 U. S. 514; City of New Orleans v. New Orleans Waterworks Co. (1891), 142 U. S. 79.

of the body politic. The purpose of this Act, on the contrary, is to divest the United States of control over and responsibility for the Philippine Islands. Counties, municipalities and other similar subordinate administrative bodies occupy territory which is an integral part of the creating state. The Philippine Islands, on the contrary, now *belong to,* but are not *a part of* the United States.[58] The purpose of the present Act is not to set up a convenient instrumentality for the exercise of the powers of the United States but to relinquish its sovereignty over the Philippine Islands.

Legislatures cannot divest themselves or their successors of the general power to repeal statutes; but are there not acts properly accomplished by legislative authority which by their very nature exhaust the power by a single exercise? Some legislatures are vested with authority to grant divorces.[59] Can a divorce, once granted by valid legislative act, be annulled and the status of marriage reestablished by the simple process of repeal? Congress in 1846 retroceded to Virginia part of the District of Columbia.[60] Assuming that the act of retrocession was constitutionally valid, could it be annulled today by repeal of the statute by which it was accomplished? Could Congress, by utes; but are there not acts properly accomplished by legislative authority which by their the repeal of the Platt Amendment and the abrogation of the Permanent Treaty by incompatible legis!ation restore Cuba to the position it occupied after the relinquishment of Spanish sovereignty over the Island?

A limitation upon the power of repeal exists of necessity, it is believed, when the effect of the valid exercise of legislative power is the creation or destruction of status. When the status of marriage is validly destroyed by a legislative act, it can no more be re-created by the mere process of repeal than could the dead be restored to life by the repeal of a bill of attainder for treason. The complete relinquishment of sovereignty over a subject people of necessity removes them and their territory completely from the field of activity of the legislative body of the relinquishing power. Whether it results in the creation of a new independent sovereignty or the transfer of the subject people to another existing state, or whether it is done by a unilateral act or by international compact, the future status of the people and territory affected by the relinquishment ceases to be a part of the subject matter with which the relinquishing state may deal by legislation. An act to repeal the relinquishment must therefore be a mere nullity.

If it be conceded that a complete relinquishment of sovereignty by legislative act, valid by the domestic constitutional law of the relinquishing power, cannot be recalled by repeal, must it not be equally true that a *partial* relinquishment of such a character as to create a semi-sovereign political entity capable of sustaining relations with other states, must be likewise immune to recall by repeal? Texas, before its admission into the American Union, was an independent republic, possessed of all the attributes of complete sovereignty. By consenting to union with the United States, it surrendered some of those attributes, retaining only those not relinquished. The surrendered attributes might be recovered by the sucessful exercise of armed force or by voluntary retrocession; but it will not now be contended that they could be recalled by a legislative repeal of the act of cession, merely because the surrender of sovereignty was not complete but only partial. The retrocesson to Virginia of part of the District of Columbia[61] was not subject to recall by repeal of the act, it is believed, although it must be admitted that the sovereignty of Virginia over the retroceded area was restricted in character.

No doubt the entire Independence Act might properly be repealed by Congress at any time before the Commonwealth constitution is adopted; and some of its provisions are of such a character that they must be at all times subject to amendment or repeal. The Act obviously contemplates that the trade relations between the Philippines and the United States are to continue during the transitional period, as provided in Section 6. The provisions of this section, with respect to the power of the Philippine Commonwealth to change them, are given permanence by the requirement[62] that their acceptance by the Filipino people is to be incorporated into the Constitution of the Commonwealth; but it can hardly be doubted that it will be within the power of succeeding Congresses to amend or repeal the provisions of Section 6, with respect to the conditions upon which exports from the Philippines are to be admitted into the United States. So, likewise, the provisions of Section 8, under which Filipinos are to be admitted to Hawaii, might be amended or repealed by Congress. The legislative authority vested in Congress to deal with the subjects of imports and immigration into the United States is one which may require exercise at any time and cannot be surrendered. There is nothing in the Act expressly indicating an intention that its provisions regarding trade relations between the United States and the Philippines, although made binding upon the Islands during the transitional period, were to be likewise binding upon the United States. A declaration of such an intention, had it been made, would have been wholly ineffectual.[63]

Quite clearly, Congress might accelerate independence by relinguishing all the retained elements of sovereignty or increase the powers of the Philippine Commonwealth by a surrender of some of them; but the fact that Congress will of necessity remain vested with power to legislate upon certain subjects with which the act deals is, it is believed, not incompatible with the conclusion that the adoption of the Commonwealth constitution and the inauguration of the government to be established by it will create a status of semi-sovereignty which Congress cannot validly destroy by a repeal of the Act by which it was created.

58. Balzac v. Porto Rico, 258 U. S. 298.
59. 9 Ruling Case Law 61.
60. Act of Congress of July 9, 1846, 9 Stat. 35 Ch. 35.
61. Stat. 35.
62. Sec. 2(e).
63. East Hartford v. Hartford Bridge Co. (1850), 10 Howard (U. S.) 511, 535.

PROPOSED REFORMS IN JUDICIAL REVIEWS OF FEDERAL ADMINISTRATIVE ACTION

Plans Introduced in Congress to Combine and Enlarge Existing Legislative Courts of the United States in One Court of Administrative Justice in Order to Secure Larger Measure of Judicial Review of Certain Administrative Decisions—Existing Situation Which They Are Designed to Correct—Terms of Senator Logan's Bill, Now Before Senate Judiciary Committee

By O. R. McGuire

Member of Washington, D. C., Bar and of Association's Special Committee on Administrative Law

"AS to the further expansion of administrative law and action," said Henry M. Bates, Dean of the University of Michigan Law School in an address of September 29, 1932, before the California Bar Association, "there can be no reversal of the present trends as long as the conditions of life remain substantially as they are today." Since these words were spoken, the first session of the 73rd Congress has met and placed on the statute books legislation rightly characterized by President Roosevelt as the most far-reaching in the history of this country and legislation which will intimately touch in its operation every man, woman and child in the United States. These and other laws must be administered by officers and employees of the Federal Government and it was stated on the floor of the Senate on January 3, 1929, by the then Chairman of the Senate Committee on the Judiciary, that: "No one appreciates more than I do the tendency of some persons appointed to Federal office to lose their perspective, and to become so obsessed with their importance as sometimes to forget the statutes for the conduct of their offices and that it is necessary to bring them (or their acts) before a court . . . to secure justice at their hands." There is unquestionably need for the most efficient and expeditious procedure for review of Federal administrative action that may be devised.

It is not my purpose at this time to trace the gradual growth of administrative law as applied by Federal officials nor to point out the many instances where the acts of such officials can not be subjected to judicial review. My purpose is rather to invite the attention of readers of this Journal to the efforts being made to create a specially trained court to hear and determine some of the controversies between the Federal Government and its citizens. In so doing, as stated by Dean Bates, the challenge "is to high and disinterested service—the stake nothing less than the preservation of democracy." Arbitrary action or refusal to act on the part of a Governmental official which can not be reviewed for lack of a tribunal or for lack of jurisdiction in an existing tribunal in these days of increasing Federal power in the economic field is not conducive to the maintenance of confidence and continued respect in any government, much less in a democracy.

Men of such widely divergent views of many public questions as Senator George W. Norris and Senator Mills M. Logan, both with judicial experience, the former as a member of a trial court in Nebraska and the latter as Attorney General and later Chief Justice of the Kentucky Court of Appeals, and both life-long students of government and members of the Senate Committee on the Judiciary, have studied this problem and both have introduced in Congress bills to combine and enlarge existing legislative courts of the United States in a United States Court of Administrative Justice, hereinafter referred to as the Administrative Court, to secure a larger measure of judicial review of certain administrative decisions. Senator Norris introduced his bill, S-5154, in the 70th Congress, while Senator Logan introduced his bill, S-1835, during the closing days of the first session of the 73rd Congress with the announced purpose of permitting opportunity for study of the bill during the coming months with the view to such modifications as should appear necessary and its attempted passage during the next session, commencing in January, 1934.

These two bills differ in some respects in the reforms which they would make and since Senator Norris has not reintroduced his bill during any of the succeeding Congresses I shall endeavor, without stopping to point out the differences, to explain the terms of Senator Logan's bill now before the Senate Committee on the Judiciary. It will be understood that what follows refers exclusively to the terms of the Logan bill.

Preliminarily to taking up the terms of the Logan bill, it seems desirable to refer to the existing situation which it is designed to correct. It would substitute a United States Court of Administrative Justice for the United States Court of Claims which was established in 1855 without authority to render judgments but to hear a limited class of cases in the nature of review of administrative decisions and to report thereon to the Congress. The jurisdiction of this Court of Claims was amended in 1863 to authorize it to render judgments against the United States in such cases with right of appeal to the Supreme Court of the United States. The Tucker act of 1887 modified the jurisdiction in certain non-essential particulars and conferred concur-

rent jurisdiction on the District Courts of the United States which is now contained in paragraph 24 of section 24 of the Judicial Code of March 3, 1911, to hear and determine a limited class of these cases. The review of both the Court of Claims and District Court judgments against the United States was under the 1863 statute and the Tucker act by direct appeal to the Supreme Court of the United States, but since the act of February 13, 1925, the review of the judgments of the Court of Claims is, by certiorari, in the Supreme Court of the United States while the judgments of the District Courts against the United States are reviewed on appeal to the appropriate United States Circuit Court of Appeals and thence by certiorari to the Supreme Court of the United States.

The limits of this paper will not permit me to discuss the details of the jurisdiction of the Court of Claims or the concurrent jurisdiction of the District Courts, but, broadly speaking, such jurisdiction of the District Courts is limited to cases arising out of contracts where the amount involved does not exceed $10,000 and to tax claims against either the United States or the Collector of Internal Revenue while the jurisdiction of the Court of Claims is limited to claims founded on the Constitution, any law of Congress, or any regulation issued pursuant to law but not including tort or pension claims or claims of any character where the right sought to be enforced is for something other than money. Generally speaking, this jurisdiction on the part of the Court of Claims includes claims of officers or employees of the Federal government for pay and allowances, contract claims, either express or implied in fact but not in law, tax claims, and claims for infringement of patents but does not include claims under the War Risk Insurance laws.

The Administrative Court would also absorb the existing jurisdiction of the Court of Customs and Patent Appeals. Unlike the Court of Claims and the District Courts of the United States, with their concurrent jurisdiction, which may review administrative decisions of money claims arising in any department of the Federal government except tort, pension and customs claims, the jurisdiction of the Customs Court is limited to claims arising under one bureau of the Treasury Department, the Bureau of Customs, and the appeals from such court are exclusively to the Court of Customs and Patent Appeals. The jurisdiction of this court is limited to reviews of the decisions of the Customs Court; to certain decisions of the Tariff Commission under section 337 of the Tariff Act of 1930; and to reviews of certain administrative decisions of the Patent Office of the Department of Commerce in the matter of Patents and Trademarks. There is a restricted right of review in the Supreme Court of the United States of the decisions of the Court of Customs and Patent Appeals.

The Administrative Court would absorb the existing jurisdiction of the ten United States Circuit Courts of Appeal and the Court of Appeals of the District of Columbia to review on the law the decisions of the Board of Tax Appeals, which is in fact an administrative court with jurisdiction limited to the reviews of the decisions of the Commissioner of Internal Revenue in tax controversies. The diversity of conclusions reached by these eleven appellate courts in their reviews of the decisions reached by the Board of Tax Appeals has resulted in a situation similar to that confronting the country when the Circuit Courts of Appeal had jurisdiction to review the decisions of the Board of General Appraisers of the Customs Service, now the Customs Court, and before that jurisdiction was confined exclusively in the Court of Customs and Patent Appeals. There is this difference, however, that the burden now on the Supreme Court of the United States in considering petitions for writs of certiorari in Federal tax cases and in hearing such cases to reconcile the decisions of the lower courts is far beyond the burden that was ever imposed on that court by the diversity of opinions in customs cases.

The Administrative Court would also absorb the existing jurisdiction of the Supreme Court of the District of Columbia, consisting of several divisions with one judge for each division, to exclusively entertain, as an original process, petitions for mandamus to require Federal officials to perform alleged ministerial duties and to entertain bills for injunction against Federal officials in those cases where it is necessary to secure service on the head of the department or independent establishment concerned. It was stated in the Senate on January 3, 1929, with respect to this phase of the matter that:

> ". . . it is not in keeping with the dignity of the United States to have its cabinet members and other responsible officers required to answer a writ of mandamus or bill for injunction before a single judge of the Supreme Court of the District of Columbia, and to have to take their turn with their questions of great importance from the standpoint of administration, between petitions for alimony and divorce cases and the heterogeneous litigation coming before that court. The dignity of the United States demands that its officers and employees be required to answer for their acts before a court composed of at least three judges who are trained in the law relating to the administration of their departments and establishments through the hearing and determination of claims which arise in said departments."

Such, in broad outline, is the jurisdiction of the various courts which would be effected by the enactment into law of the Logan bill. It may be stated for the statistically minded that a tabulation compiled from the annual report of the Attorney General of the United States for the fiscal year 1932 shows a volume of civil cases for 1931, as follows:

	Government	Non-Government
Supreme Court of the United States		
Cases determined	75	148
Applications for certiorari	307	440
United States Circuit Courts of Appeal		
Board of Tax Appeals	364	
District Courts	116	3,189
Court of Claims		
Cases docketed	536	
Cases pending at end of term	1,576	
Court of Customs and Patent Appeals		
Cases docketed	294	
Cases pending at end of term	267	
United District Courts		
Cases commenced	3,193	26,326
Cases determined	3,479	26,045

No statistics are readily available to the writer showing the number of mandamus and injunction cases in the Supreme Court of the District of Columbia to which officials of the United States were parties during the 1931 term nor the number thereof which were carried to the Court of Appeals nor

from thence to the Supreme Court of the United States, though the record does disclose that 14 cases from the District of Columbia Court of Appeals were submitted during the term to the Supreme Court of the United States. Also, the statistics reported by the Attorney General do not show clearly the number of cases in the Supreme Court of the United States to which the Federal government was a party and which consisted of money claims against the Government, but the available statistics are interesting. The Solicitor General reported for the fiscal year 1932 that in the Supreme Court of the United States "38 per cent of all appellate dispositions during the last term were cases in which the Government was involved as a litigant. In the 75 per cent of the cases disposed of, without oral argument, the Government was a litigant in 39 per cent. In the 25 per cent of cases which reached the stage of argument, 34 per cent were Government cases." He also stated that frequent amendments of the tax law "call for new constructions, and new conflicts arise which must be resolved in the court of last resort, whether the question be of intrinsic importane or not."

The questions may well be asked as to why we should continue with a system where conflicts in decisions arise in tax cases and why "must they be resolved in the Supreme Court of the United States" when it is evident from the statistics quoted from the report of the Solicitor General that more than half of the time of that court in the disposal of cases without oral argument is devoted to Government cases and that there was consumed by the Government in that court more than a third of the oral arguments. The Supreme Court of the United States was not created to act as a glorified Court of Claims, and it is a matter of conjecture how long the Federal government will be permitted to absorb more than a third of the time and energy of that court.

Specialized courts seem to be the answer, and it is not without significance that the United States Customs Court disposed of 96,694 cases in 1931; that only 114 were docketed from that court in the Court of Customs and Patent Appeals and that out of 113 cases decided by the latter court during the term applications were made for writs of certiorari in 11 cases, ten were denied and one was pending at the end of the term. Even as between courts of equal ability, the court devoting its entire time to Government cases must needs become more proficient in such cases than a court which devotes, on the average, approximately a third of its time to such cases. These statistics are interesting from another standpoint. The Court of Customs and Patent Appeals, consisting of five judges, had docketed during the term only 294 cases and had pending at the end of the term 267 cases as compared with 536 and 1,576, respectively, in the Court of Claims and the large number of Government cases in the Circuit Courts of Appeal as compared with the number of non-government cases in such courts.

These statistics establish one of the reasons as to the why of the proposed Administrative Court. It is proposed in the bill to transfer to that court the five judges of the Court of Claims and the five judges of the Court of Customs and Patent Appeals and to add five more judges, making a court of fifteen judges, with authority to sit in divisions of three for the purpose of hearing cases and in divisions of five for the purpose of determining motions for new trials. This would, in effect, result in five courts for the hearing of cases or three courts for the purposes of new trials. The advantages are obvious of such a system in establishing justice between the citizen and his Government; in preventing conflicts in decisions; and in securing expeditious reviews of administrative decisions in the class of cases within the jurisdiction of that court.

Without in any manner disturbing the substantive law of the Court of Claims and the Court of Customs and Patent Appeals, such courts would be abolished under the Logan bill and the Administrative Court would exercise all of the jurisdiction now exercised by the two courts. Without in any manner disturbing the substantive law for reviews of the decisions of the Board of Tax Appeals, the jurisdiction of the Courts of Appeal to make such reviews would be abolished and the reviews transferred to the United States Court of Administrative Justice. Without in any manner disturbing the administrative law of the jurisdiction of the United States District Courts to hear and entertain suits against the United States, the reviews thereof would be transferred to the Administrative Court and the jurisdiction of the Courts of Appeal over such reviews would be abolished. Without in any manner disturbing the existing law of mandamus and injunction against Federal officials, the jurisdiction in such cases would be transferred under the bill to the Administrative Court and the existing jurisdiction in that respect of the Supreme Court of the District of Columbia would be abolished.

Similarly to the existing procedure of the Board of Tax Appeals, the Logan bill makes provision that at least a division of the Administrative Court shall hold sessions in each of the existing ten Circuit Courts of Appeal districts. It is not to be overlooked that while the existing Custom Court has its headquarters in New York City, the various judges hold sessions, as the business warrants, in the custom collection districts throughout the United States and neither with respect to the Board of Tax Appeals nor the Customs Court has there been any serious complaint on the part of the bar that there was any undue concentration of the work of these tribunals in any particular locality. Also, there would be continued under the bill the existing commissioners of the Court of Claims who act as masters in the taking of testimony anywhere in the country when the case is within the original jurisdiction of that court.

The bill does not propose to disturb the existing procedure for reviews of the Federal Trade Commission cease and desist orders; the Interstate Commerce Commission orders relating to rates; the decisions of the Secretary of Agriculture under the Packers and Stockyards Act; the decisions of the Postmaster General in the exclusion of matter from the mails, etc.; the decision of the Radio Commission, nor the deportation orders of the Secretary of Labor. In fact, under the Logan bill, the jurisdiction of the Administrative Court would be confined to review of money claims against the United States now within the jurisdiction of other courts with the addition of the existing jurisdiction of the Courts of the District of Columbia to issue

extraordinary writs against officials of the Federal government, which could be properly developed and extended to reach on their merits many administrative decisions not now possible to bring under judicial review. The creation of a single court, sufficiently large to hear and determine expeditiously the controversies within its jurisdiction would result in a situation similar to the procedure long since adopted in France in the establishment of the Council of State and in the various subdivisions of the German Republic by the establishment of administrative courts. However, it is not proposed at this time to give the administrative court of the United States the broad jurisdiction exercised by the French Council of State nor by the administrative courts of Germany.

Congress has unquestionably the power to establish such a court. As stated by the Supreme Court of the United States in its opinion of May 29, 1933, in *Williams v. United States:*

". . . since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted courts, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article. That is to say, a power which may be devolved at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers."

It is to be assumed that the Chief Justice of the Administrative Court would have due regard for the special training of the justices of the various divisions of the Court in the assignment of cases and that if in any case such a division reached an erroneous conclusion, the error would be corrected in most cases when the motion for a new trial was considered by five justices of that court. Thus the Supreme Court of the United States would be saved from considering the present large number of Federal Government cases and there would disappear for the time being at least the suggestions for increases in the number of judges on certain District and Circuit Courts of Appeal benches.

If the bench and bar would best serve their country, means must be devised to prevent greater burdens of taxation on the American people through the maximum utilization of judicial machinery and means must be devised to secure expeditious reviews of Federal administrative action by a tribunal independent of the administrative branch of the Government and by a tribunal equipped through experience and training to handle the increasingly complex questions confronting administrative officials of the Federal Government. The alternative is no review by an independent tribunal in classes of controversies which are now too large and are growing larger with almost every session of the Congress. It is a singular fact that in most of the far-reaching legislation enacted during the first session of the 73rd Congress no express provision whatever was made for judicial reviews of administrative action. Also, that as to some of the legislation existing since 1863 the courts have upheld administrative stipulations in Government contracts that administrative decisions, as to certain questions, shall be final and conclusive; that is, not subject to judicial review.

DEPARTMENT OF CURRENT LEGISLATION

The Legislatures and Relief of Debtors

BY JOSEPH P. CHAMBERLAIN

LEGISLATURES meeting in January, 1933, were besieged by appeals from mortgage debtors for relief. The long-continued depression with its resulting unemployment, low prices for farm products, greatly decreased rent returns on buildings, had reduced the sale price of real estate. The failures of many banks and the general credit insecurity, which made it practically impossible to secure new loans on real estate, added to the elements which depreciated the value of the mortgaged property. When the bank moratoria came, it became doubtful what could be obtained for property sold under foreclosure. As a consequence, the mortgage debtors could expect to realize little or nothing on their equities and it would frequently happen that the mortgaged properties would bring less than the amount of the first mortgage so as to leave a deficiency judgment against the debtor. The debtors, however, were hopeful that an increase in prices of products and of rents, and easing of the financial situation would enable them to meet their payments and to refinance their obligations, or in the event of a sale of the property, to secure a higher price which would at least equal the mortgage debt.

In addition to the owners, junior mortgage holders and unsecured creditors would frequently be wiped out in case of foreclosure since the property would not bring any excess of the first mortgage and they would be left only with judgments against the property holder, which in times like these would usually be of little value.

It is no wonder that the legislatures were very generally prayed to take action for the relief of the

debtor class by delaying proceedings to enforce payment of debts, and it is not surprising that a number of them, mostly in predominantly agricultural states, met the demands upon them by legislation. At the time at which this article was prepared not all the legislatures had closed their sessions, nor was it possible to ascertain in all cases what bills were passed, but it was thought that there is sufficient interest in moratorium acts, and that the question is sufficiently immediate to make it worth while to deal with the statutes which are available.

Many of the statutes are based on the emergency, and the greater part of them are for a limited period. The statement of the emergency stresses the crisis and financial difficulties with the accompanying low prices of land, and, as the legislatures say, the resulting unfairness to owners of a forced sale. It is interesting that in no case is the position of the second mortgagee stressed though he frequently will be as interested as the owner in holding off foreclosure of the first mortgage till better times. Following the theory that the legislatures are meeting an emergency, most of the acts are limited for a period of approximately two years, though in one state, Wisconsin, Ch. 11, the court may direct that there shall be no sale on foreclosure in any particular case for a period of not over three years, or beyond March 1, 1938. The two-year period usually runs to March 1, 1935, so that the situation may be laid before the legislatures at the next biennial sessions and they can then take such other action as they see fit. In some cases, however, the moratorium is for a shorter period. Kansas, Ch. 232, declares her moratorium on sales under foreclosure for 6 months after March 4, 1933, and allows the Governor to extend the period for another 6 months. Minnesota, Ch. 90, authorizes postponement of sale for 90 days subsequent to April 30, 1933.

Another way of securing delay appears in Oklahoma, S. B. No. 76, which allows a defendant 9 months after service to answer in a foreclosure case, and in an action pending at the time the act goes into effect, forbids trial or judgment until 9 months after the date of the passage of the act.

The acts usually allow a stay in proceedings for the foreclosure of real estate mortgages and will apply in the main to mortgages executed prior to the passage of the act. Such, for example, is Arizona, Ch. 29, which authorizes a stay not only for the foreclosure of the mortgage but for any action on notes secured by the mortgage and expressly extends the protection to instruments "executed prior to the passage of this act." Apparently, mortgages executed subsequently to the passage of the act will not be covered. Nebraska, H. R. No. 600, applies to all real estate mortgages, deeds of trust, land sale contracts, or notes received therefor. The court orders continuance to March 1, 1935, unless good cause to the contrary is shown.

Most of the acts do not make the granting of the stay obligatory but authorize the court to use its discretion, sometimes, as in the Nebraska statute just cited, putting the burden on the plaintiff to show good cause why the continuance should not be permitted, but more frequently providing that the stay shall be granted if "good and sufficient reasons exist therefor." The difference may not be important in practice, but it would seem in theory that in the first case the burden would be on the mortgagor to show that the stay should not be granted, and in the second case, it would be on the mortgagee who is the moving party in seeking the postponement.

Montana, S. No. 172, is careful to require a hearing after notice to the plaintiff. The Kansas 6-months moratorium, which may be extended by the Governor, is absolute and forbids the issuing of any sheriff's deed during the period. It is usual for the stay to apply to any action for foreclosure of a mortgage, so that it may be invoked in case of a business building or an apartment house, but in Wisconsin, Ch. 11, the act is limited to farms and homesteads.

The legislature normally allows the judge a further discretion in respect to the length of time of the stay which he will grant, fixing the maximum period for which it is permitted. Wisconsin, for example, allows the stay to be for a reasonable period not in excess of the time for which the act is limited, and Oklahoma, S. B. No. 76, lays it down that the stay may be granted "for such time as the judge may deem best," but as the act is in effect for two years only, the discretion of the judge is automatically limited. Minnesota, Ch. 90, which limits its period of postponement to 90 days after April 30, 1933, leaves the extension of time to the sheriff, as the act is permissive and not mandatory.

The law-makers did not intend to leave the mortgagee without protection. The court under its power of appreciation may refuse a stay which it would consider inequitable to the mortgagee, and the court is further directed to review its action at the request of the mortgagee, in Montana, S. B. No. 172. If the mortgagee is obliged to delay his action, he should be given assurance against the danger of waste to the property and must be protected in his claim to a proper use of the income. This may be done as in Arizona, Ch. 29, and Iowa, H. F. 183, which require the court, in making its order, to determine who shall have the property during the stay and in so doing to prefer the owner in possession. The person in possession, however, is held under the control of the court and must make an accounting for the use of the property. This accounting he makes to the county clerk, who applies the rents or proceeds paid him on taxes, insurance and maintenance of the property and then disburses the balance as the court may direct. Nebraska, H. R. No. 600, requires the clerk to pay taxes, insurance, maintenance and interest, and allows the distribution of the balance under the order of the court. A provision allowing the court to fix a fair rental value of the premises would ordinarily apply to a case in which the mortgagor was continued in possession of his home so that he would have to pay rent, and the mortgagee would receive what the court believes the property should bring.

Under these statutes the mortgagee is given at least a formal protection. The legislature has evidently desired to avoid the expense of a receiver who will guard the interest of the mortgagee. The duty of the county clerk would seem to be merely to receive what is paid him with no obligation as a receiver or trustee to assure himself that the payments made are correct. He will have the estimate of the court as to the rental value of the premises to guide him but he would not seem to be under any

obligation to watch the property to be certain that full value of the proceeds are accounted for, or to look out for waste. This the mortgagee must take care of himself, and he may bring to the attention of the court any failure on the part of the owner in possession to carry out the terms of the order.

A further protection to the mortgagee resides in the power of the court to set aside its order granting the stay for violation of the order or for other good and sufficient cause. Oklahoma, S. B. No. 76, expressly declares that the act shall not cover land which the owner or the mortgagor attempts to convey without the written consent of the mortgagee during the stay. Wisconsin and Oklahoma do not put a new burden on the clerk. Wisconsin allows the court to appoint a receiver in its "sound discretion" though the legislature expressly provides that default in payment of taxes, interest or insurance premiums shall not of itself be a cause for the appointment of a receiver. Oklahoma authorizes the judge to appoint a receiver of any property, except a homestead, to operate it or prevent waste, and the receiver shall apply the rents as the court directs.

The right to request a stay will clearly give the mortgagor a bargaining power in an endeavor to secure a settlement, which may be an extension of time, or reduction of interest, or some other advantage. The Arizona and Iowa legislatures recommended to the court that it use its discretion in trying to bring the parties together in some form of accommodation, while Wisconsin, Ch. 15, goes much further. The Badger legislators set up for the emergency, County Boards of Conciliation to try to arrange settlements in cases of action against real estate which constitutes a home. The tendency to individualize the treatment of debtors, which is marked in the power of the courts to use their discretion, is developed in the powers of the board, whose duty it is to inquire into the ability of the debtor to pay "presently or in the future," and its authority to make recommendations to extend the time, reduce interest, or to divide the income so that the debtor may have enough to maintain his family and the premises, and then to pay taxes and insurance; the creditor getting the balance. The arrangement may be to persuade the creditor to accept a conveyance of the property in full satisfaction of the mortgage and thus avoid any deficiency judgment. The Board has no power except persuasion, but there is weight in the consideration that its report will be before the court when it exercises its discretion in respect to foreclosure, which includes the power to stay action and the power to fix the value of the premises for the sale.

The Wisconsin act just referred to brings out the importance of the deficiency judgment. If the mortgagee consents to take a conveyance of the property in full discharge of the obligation, his claim is settled and there can be no deficiency judgment, but Wisconsin, Ch. 13, deals with another way of meeting the problem of the hardship of a forced sale by authorizing the court, in the exercise of its equitable powers, to fix the value of the mortgaged premises before sale under foreclosure. It may act at the time of rendition of judgment, or any time thereafter before sale, on the application of any party in interest, which would probably include a junior mortgagee as well as an owner. The court might fix a price which would prevent a sale until there was an improvement in the market, thereby preventing a loss on account of a temporary condition of stringency of credit, or for some other cause. Chapter 13 is not limited to the emergency, but is considered by the Wisconsin law-makers as a part of their permanent machinery for the safeguarding of mortgagors. Kansas, Ch. 218, also a permanent act, and not limited to the emergency, authorizes the court to decline to confirm a sale where a bid is substantially inadequate, or in ordering a sale or resale, after hearing, to fix a minimum price for the premises. It provides another way of securing better treatment for the debtor by allowing the court on application for confirmation of a sale, if it has not fixed a minimum price, to require that the fair value of the property be credited on the judgment, interest, taxes and costs. Fair value the court may establish at a hearing. The object of protection against deficiency judgments is obvious in the clause stating that a sale for the full amount of the judgment, taxes, interest and costs "shall be deemed adequate." This act, as the Wisconsin act, is declared to be an exercise of the equity powers of the court.[1] Arkansas, Act 57, follows the same line in making the value of real estate in a sale on foreclosure "the value of the loan," irrespective of the amount realized at the sale. No decree of foreclosure may be made unless the plaintiff stipulates that he will bid the amount of debt, interest and costs. The legislature goes further and directs the court not to confirm the sale unless it is for "the fair market value", so that if the fair market value is more than the value of the loan, it would seem that a bid for the amount of the loan would not be sufficient to warrant confirmation. The Supreme Court is expressly given the right to review the finding of the Chancellor, "even though no fraud or inequitable conduct is attributed to any person conducting said sale or any party interested therein."[1a] New Jersey, Ch. 82, also deals with deficiency judgments. Obligors on the bond in case of a deficiency judgment may dispute the amount of deficiency at a hearing. Evidence of the fair market value of the property at the time of sale may be introduced, and the court, with or without a jury, may determine the true deficiency by deducting from the debt the fair market value which it may fix. This value may be that determined by three assessors chosen by agreement of the parties. If, however, an obligor makes this request, he loses his right to redeem in case of foreclosure. The device of valuation is not new in American procedure and is frequently used by courts in case of sale of a railroad.[2]

South Dakota, S. B. 21, differing from the other statutes noted, looks to the future. In case of the foreclosure of a purchase money mortgage "hereafter executed" there shall be no deficiency judgment for the note or mortgage. A note secured by purchase money mortgage must show its character by endorsement and shall not be negotiable, nor can it be enforced by action, as set-off or counterclaim. Its only sanction is foreclosure of a mortgage.

The acts do not indicate what would be a fair value, nor do they give much help to the courts in

1. Acts of the Recent Legislature Relating to Powers of a Court of Equity in Confirming Judicial Sales in Mortgage Foreclosure Cases by Schuyler C. Bloss, Kan., Judicial Council Bull. 7:6-11, Apr. 1933.

1-a. Ark No. 57 was held void as impairing the obligation of contracts in existence when the Act took effect, in Adams v. Spillyards, Ark. Sup. Ct., No. 4-3087, June 19, 1933.

2. Jones, On Mortgages (8th ed.) §2074.

fixing that value. It would seem, however, that the legislatures had in mind something much more than the conditions which a court will usually allege when it refuses to confirm a sale. Normally, if a sale is made fairly and there is no charge of fraud or unreasonable advantage, the fact of the publicity of the sale and the public character of the officer conducting it are sufficient guarantee of its equity, so that it will be confirmed without reference to the amount realized. An inadequate price may, however, be a ground for setting aside a sale if the court is shown that a higher price might be named on a resale.[3] A bank moratorium or other financial stringency might especially affect the sale on the day set, so that there would be no chance of a reasonable price being obtained, and under its equity power the court might order a new sale when the especially unfavorable factor has ceased to operate. The legislatures evidently had a broader view of "fair value" and intend the judge to take into consideration to some degree the general financial and economic conditions which constitute the emergency, which will lead to setting a very different figure than that the property would bring under the fairest conditions on the day of sale, or perhaps the immediate future. If so, the clause may prevent a sale for a very long period, and will be a persuasive inducement for the agreement on the part of the mortgagee to take the property in full satisfaction. This last solution would protect the owner, but it would not help the junior mortgagee.

The effect of the stay laws will be to extend the period for which the mortgage debt will run and may even compel the mortgagee to lose his interest for the period of the extension. Under most of the statutes, he may get what is left of the income after taxes, insurance and maintenance are paid, if the court so order, but there may be little remaining if the court take, as it probably will, a broad view of the expression "maintenance of the property," and include a reasonable wage for the farmer who is operating the farm. He is, however, protected against waste and against the danger that the person in possession would sell the products of the farm and convert the proceeds to his own use, since there must be an accounting. Where the accounting is made to the clerk of the court, however, it is obvious that the mortgagee must himself watch the operation of the land or building and himself apply to the court in case he suspects unfair dealing. Where the property concerned is a large building, this will not be difficult, but where it is small farms or dwellings, it is obvious that the mortgagee, if it be a corporation having a large amount of such property, must organize some kind of force to protect itself.

Stay laws are no new experience in this country. They have been the usual means of protecting debtors under great emergencies. They were particularly in effect during financial difficulties and the hard times just after the Revolutionary War and during the Civil War. The Civil War moratoria had but little success in the courts against the claim that they impaired the obligation of contracts. Those moratoria, however, were usually for a long period, especially in the South, till after the end of the War. The courts declared that depriving a creditor of his right to enforce his credit was equivalent to depriving him of his credit, and if this were done for an indefinite period, it was forbidden by the contract clause of the Constitution.[4]

The Supreme Court has dealt with the protection of mortgagors in the form of acts extending the equity of redemption. The Court has held consistently that a law which creates or extends a period of redemption cannot apply to a contract in effect at the time of the passage of the law, as to so apply it would be an impairment of the contract clause of the Constitution, Article I, Sec. 10.[5] The Court admits that the states may change legal methods of enforcement but not to the extent of thereby materially impairing the creditor's rights and remedies. It is not easy to draw the line. If the remedy is denied altogether, so that the contract cannot be enforced, there is an obvious impairment of right, and this is equally true if the procedure is so burdened with new conditions and restrictions as to make the remedy scarcely worth pursuing. In applying this principle, the Court has held that a law passed after the contract was made, allowing twelve months equity of redemption, impaired the obligation of the contract, since it might "deprive the mortgagee of the benefit of his security by rendering the property unsalable for anything like its value."[6] More recently during the depression of 1893, the Court reaffirmed the rule in *Barnitz v. Beverly*, deciding that a statute of Kansas granting an equity of redemption of 18 months could not apply to contracts made before its passage.[7]

The acts reviewed in this article are in a different form from the equity of redemption statutes, for they do not, as was objected in the Supreme Court decisions, create a new estate in the mortgagor, but take effect on the procedure of the Court. Furthermore, they are not mandatory, as were the earlier laws, but are permissive, and allow the court to take into consideration all the circumstances which might affect its judgment. Another objection strongly urged in the Barnitz case could not apply. In that case the Court observed that the law gave the mortgagor possession during the redemption period with the right to rents, issues and profits. To the acts reviewed this objection cannot be made, since the mortgagor in possession during the stay is obliged to account for the rents and profits, and to pay them to a person appointed by the Court. Furthermore, he is constantly within the control of the court and the stay may be vacated at any time if he does not take care of the property and pay over the proceeds or the rent. Again the objection that the creation or extension of an equity of redemption will affect the price for which the property can be sold will not apply to laws which stay the sale. It is obviously the expectation of the legislatures that conditions will improve during the stay and with them prices for real estate, so that the mortgagee is more likely to realize a good price if he waits

A distinction was made, however, in a Wiscon-

3. Jones, op. cit., §§2101-8.

4. Note, 9 A. L. R. 6.

5. 19 R. C. L. 652.

6. Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143 (1843). See Rose's notes to this case citing state cases. Howard v. Bugbee, 24 How. 461, 16 L. Ed. 753 (1860); McCracken v. Hayward, 2 How. 613, 11 L. Ed. 397 (1844).

7. 163 U. S. 118, 41 L. Ed. 93 (1895). Barnitz v. Beverly was applied as the law in Thornburg v. Jorgenson, 60 F. (2d) 471. A North Dakota statute of Feb. 21, 1933, extending the period of redemption on foreclosure, was held void as an impairment of the obligation of contracts in State ex rel Cleveringer v. Klein, N. Dak. Sup. Ct., June 12, 1933.

sin case in 1859, in which an act which allowed 6 months for an answer in a foreclosure suit, and added the requirement of an additional 6 months' notice of sale, which amounted therefore to a year's delay, was held valid, although it contained no safeguards for the mortgagee. The court drew a distinction between this case and the Supreme Court rule in respect to redemption, on the ground that the extension applied only to the proceedure and was reasonable. Obviously the financial stringency, which the court believed had induced the legislature to pass the act, was a justification for the measure, and the period of the extension was not so great as unconstitutionally to impair the obligation of the contract.[8]

The expedient of establishing a valuation has also been tried and condemned so far as it applies to contracts made before the passage of the act. The Supreme Court had to deal with such a case in *Bronson v. Kinzie*[9] and held as an impairment of a contract a statute which required that a sale be held void if for less than two-thirds of the value appraised by a board of appraisers. The Court said that this would impose a condition which would often make a sale impossible and thereby prevent the creditor realizing on his security.[10] This rule is not followed in all the state cases.[11] In a case in Pennsylvania[12] the court allowed the application of the new law, but thought it very doubtful even in spite of the emergency caused by collapse of the credit system on which the court relied.

In some of the state cases sustaining stay laws, there is reference to emergencies which caused their passage, but the Supreme Court does not appear to have considered this element. The declaration of emergency by the legislatures and the obvious conditions in the financial and economic world today will, however, make it probable that the courts will consider whether or not stay laws can be sustained under the emergency for a limited period, even though they would be objectionable if they were introduced as permanent changes in the state law. In support of this contention, the general approval of the soldiers' moratoria laws may be urged. These laws were passed quite usually during the recent War providing a stay of all actions against soldiers while the war lasted, and for a specified term thereafter. Similar acts passed during the Civil War were generally held valid, although the acts granting moratorium to others than soldiers were not sustained.[13]

The argument in favor of the exercise of extraordinary powers during an emergency, even though it may result in the modification of the terms of a contract, so long as the emergency exists, will be aided by the decisions maintaining the rent laws during the rental emergency caused by the shortage of housing after the war. It was expressly decided that these acts ceased to be valid after the emergency had ended.[14] The present emergency is of an entirely different nature from that to cover which the rent acts were passed. Then it consisted in the shortage of houses, and the court intimated that housing had become a public utility for the period of the emergency. At the present the emergency is not too few houses, but the financial and economic crisis which the legislatures felt made it necessary to have a moratorium. The legislatures may have noted the rent law provision assuring the owner of a reasonable rental fixed by the court or a commission, so that the owner got a return which was estimated to be reasonable and was not, therefore, deprived of the fruits of his property. The stay statutes usually provide for a rental to be fixed by the court for the period of the moratorium. The taxes, insurance, and expense of maintenance may use up the whole of this rental, but if it does not, the mortgagee may receive his interest in whole or in part. In any case the fair rental value as fixed by the court must be paid, if the stay is to continue in force.

Legislatures have evidently attempted in these stay acts to avoid some of the pitfalls into which their predecessors fell in endeavoring to help debtors, and they have buttressed their statutes with the emergency. It remains for the courts to say whether they will accept the lawmakers' argument.[15]

8. Von Baumbach v. Bade, 9 Wis. 559 (1859).
9. *Supra*, note 6.
10. See Rose's notes, 42 L. Ed. 253, for other cases.
11. See article by Schuyler C. Bloss, *supra*, note 1.
12. Chadwick v. Moore, 8 W. & S. (Pa.) 49 (1844).
13. Thress v. Zemple, 174 N. W. 85, 9 A. L. R. 1, (1919), and note.
14. Block v. Hirsh, 256 U. S. 135, 65 L. Ed. 865 (1920); Levy Leasing Co. v. Siegel, 258 U. S. 242, 66 L. Ed. 595 (1922); Chastleton Corp. v. Sinclair, 264 U. S. 543, 68 L. Ed. 841 (1923).
15. For a general discussion see note in 27 Ill. Law Rev. 799, Mar. 1933; Moratory Legislation: A Comparative Study, by A. H. Feller, 46 Harv. Law Rev. 106.

The American Judge

(Chicago Tribune, July 23)

Although the American intelligentsia are voicing their discontent with the American order, and few there are among them to do it reverence, perhaps a surviving impulse of regard for an American institution here and there may find response in the commonalty.

For example, there is the American conception of judicial independence. In the American order the judiciary is the defender of the rights of the individual against the encroachment of executive and legislative power. In the European order the judge is a functionary of the government. Under monarchy he was and is the king's officer. . . .

In the colonies there was a stubborn struggle against the king's judges and out of it was born the American determination to establish a judiciary which should protect the individual from the oppressions of government. We did away with kings and we had set up executive and legislative power with wise limitations which we empowered an independent judiciary to enforce.

Though the federal judiciary is appointed by the executive with the advice and consent of the senate, the judicial authority is not derived therefrom but from the sovereign, the people, and while some judges in our history, as in the brief episode of the Federalist vagary and in the sorry experiment of prohibition, forgot this principle, the people and, in the main, the judiciary have never done so. The American judge is the direct agent of the sovereign, but the people is the sovereign and looks to the judiciary as the special defender of the rights of the freeman against encroachments of his government.

The profound wisdom and foresight of the statesmen who wrote our fundamental law was in no other respect so clearly manifested as in their conception of this function of the judicial office in a republican government. If this, the highest and most momentous duty of the American judge, ever becomes obscured or overborne by the ambitions of government or the menace of popular impulse the American system of ordered liberty will come quickly to its end. Americanism, with its faith in the free man, in human progress through his conscience, his intelligence, and his good will, will not survive the loss of an independent judiciary, not the king's men, nor the government's men, but the servants and guardians of the liberties of the people.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

GROVER CLEVELAND: A Study in Courage, by Allen Nevins. (Dodd, Mead & Co.)—It is doubly gratifying that the Pulitzer Prize for the outstanding biography of the year should have gone to Mr. Allen Nevins (professor of political science, Columbia University) for his excellent biography of Grover Cleveland—who for years lived, and doubtless loved, the life of a hard-working lawyer.

As Cleveland's political opportunities came to him largely because of the place he had made for himself in the law, it will please lawyers to find an adequate account of his legal education and his life at the Buffalo bar.

His beginning was discouraging enough. On entering a law office to begin his studies a copy of Blackstone was thrown on his desk, and later when he complained of the slow progress he was making he was given to understand that he would learn as much law as he had the wit to pick up by his own devices. The method worked well, for he was a bright and diligent student, and before many years he was a busy, prosperous and respected practitioner. The outstanding characterstic that marked his legal career was an extraordinary diligence:

> "All records of him in the sixties and seventies emphasize his abounding energy and immense powers of industry. He worked not with set jaw or tense nerves, but simply as a man who never knew physical or mental exhaustion. He could labor all night over some urgent case, turn out his gas-lamp at dawn, take a bath and some hot coffee and be fresh for presenting his case in court. He could take a long and intricate brief, possess himself of its contents, and so memorize his argument that he could deliver it without notes and never falter over a sentence."

From his life as a lawyer the story runs on to his political career and from then on follows him along the broad stream of the history of his times. Nothing of historical consequence, or of value in appraising Cleveland's place and part, has been omitted. And what is more, it is all told with painstaking accuracy, a wealth of illuminating detail and in concise and readable style that carries the reader very pleasantly indeed through what is a major historical work, as well as a definitive biography.

* * *

Memories of an Arizona Judge, by Richard E. Sloan. (Stanford University Press).—Judge Sloan, formerly a justice of the supreme court of Arizona, went to the Arizona territory in 1884, and in these memories tells of his experiences as a lawyer, a judge and finally as governor during the territorial days. The judge, a native Ohioan, went west, as young men did in those days, and found there the opportunities and the adventure he was seeking. His method is homely; he tells a series of short stories of courts, judges, lawyers, politicians, Indians, and the many comic and tragic characters of the old west. He writes with ease and with the delightful humor of one who thoroughly enjoyed it all.

* * *

Erskine, by J. A. Lovat-Fraser. (Macmillan).—This compact life of Erskine is well worth the time of anyone who is not familiar with the career of that distinguished and eloquent lawyer, to whom it will be recalled we owe one of the most moving and courageous statements of the duty of a lawyer to his client.

* * *

The Children's Judge, by M. A. O. Howe. (Houghton Mifflin Co.).—This little volume contains a brief account of the life and work of Judge Frederick Pickering Cabot, who for some years presided with wisdom and kindliness over the Juvenile Court of Boston. The nature of his judicial work and his attitude toward the problems it presented is described largely in the words of actual observers, and throws some interesting light on how the law can best deal with the youthful offender. Judge Cabot's career until he took his judgeship followed the traditional lines of the well-born and successful lawyer, but from that point on he struck out into new paths and led an uncommonly useful and unselfish life.

* * *

Saint Calvin, by Duff Gilford. (Vanguard Press).—This is a series of short stories about Calvin Coolidge. None of them touches on his life as a lawyer and the only one of any special interest concerns the rejection of the nomination of Mr. Warren for Attorney General and the subsequent confirmation of Mr. Sargent. The volume is of no particular interest.

* * *

Henry Adams, by James Truslow Adams. (Albert and Charles Boni).—Henry Adams in his *Letters* refers to himself as a lawyer, and later did some scholarly research in legal history, but in the law he cannot be ranked with the great lawyers produced by the Adams family. Still, his was a distinguished life and this short biographical sketch is interesting and unusually well written.

* * *

Andrew Jackson, The Border Captain, by Marquis James. (Bobbs-Merrill).—To Andrew Jackson there was given the most glamorous and colorful career ever to befall an American lawyer. And while in this biography of his earlier years his life as a lawyer and as a judge is rather sketchily treated, we do learn something of his legal studies and something too of his conduct as a practicing lawyer, and as a judge. To most lawyers this light treatment of his legal career will make little difference, because all of the fire and drama

of a great fighter moving in the center of stirring events is eloquently portrayed in an engaging style and with commendable scholarship. This is, happily, a biography one enjoys recommending.

* * *

Francis Bacon, by Mary Stuart. (William Morrow & Co.).—Of Bacon it has been said that his was the greatest mind ever to apply itself to the study of the law. Whether this be true or not detracts nothing from the fascination of the man, some of which has been captured in this short study of his life. This volume stresses no one phase of Bacon's life, and its lightness and brevity make it easy to read and quite enjoyable.

* * *

John Marshall: In Diplomacy and in Law, by Lord Craigmyle. (Charles Scribner's Sons).—This volume contains a series of lectures given in this country during the past year by Lord Craigmyle, formerly Lord Shaw of Dumfermline. The lectures are entitled: The Making; In Diplomacy; and The Chief Justiceship. They are interesting only in showing the esteem in which Marshall is held by a distinguished British lawyer, and are not particularly recommended.

* * *

Charles Carroll of Carrollton, by Joseph Gurn. (P. J. Kennedy & Sons).—That Charles Carroll signed the Declaration of Independence is enough to warrant an account of his life; but if more reason be needed it can be said that he was a noble and courageous citizen who freely used his powers and attainments (not the least of which was a training in the law) in furthering the interests of liberty. This account of his life is carefully and entertainingly written.

* * *

Woodrow Wilson, by John K. Winkler. (The Vanguard Press).—Winkler's biography of Woodrow Wilson tells again the familiar story of his rise from an obscure lawyer to a seat among the mighty, and it is recommended to those who wish a short, rapidly moving and readable account of the great President's life.

JOSEPH HOWLAND COLLINS.

New York City.

Federal Tax Handbook, Revenue Act of 1932, by Robert H. Montgomery. Ronald Press Company, 1435 pages.

Lectures on Taxation, Columbia University Symposium, 1932, Edited by Roswell Magill. Commerce Clearing House. vi, 254 pages.

These two volumes are full of reminders that it is hard to draft a fair and productive tax law, and hard to construe any tax law after it is drafted and enacted. The first-named book gives an annotated treatment of the present federal tax laws and the methods by which they are administered. It does not purport to be a treatise, but is very generous in scope for a handbook. The other, and smaller, book presents a group of seven relatively short lectures on a variety of tax subjects,—averaging about thirty-five pages apiece,—by seven well-informed writers on taxation, one of whom is Colonel Montgomery, the author of the Handbook. His contribution, "Accounting and the Concept of Income," emphasizes the fact that net income cannot be determined without a considerable amount of good guessing and good judgment. He analyzes and criticizes various phases of the statutory method of determining net income,—by no means always agreeing with those who administer the tax,—and comments on the present-day tendency toward taxing gross income in some situations.

Walter Ewing Hope, former assistant secretary of the treasury, cites and analyzes the supreme court decisions regarding federal estate taxes as applied to *inter vivos* transfers, devoting principal attention to the provisions as to gifts "to take effect in possession or enjoyment at or after death."

The lecture of Arthur A. Ballantine, recently undersecretary of the treasury, outlines the present structure of the tax-determining and tax-collecting agencies of the United States treasury and their method of operation.

In Edward H. Green's lecture on the "Taxation of Corporate Income" he compares various situations which are met with in calculating the income tax of corporations, and shows how highly artificial the provisions of existing law are, the tax results being different in many cases where the substance is the same, because the tax law makes the amount of tax dependent on form and method rather than on substance. The examples which he cites from his experience as a New York City corporation lawyer are mainly in the difficult and interesting fields of reorganizations and consolidated returns.

The three other lectures have to do with the problem of lessening the serious difficulties which arise when various sovereignties seek to tax the same transaction or the same property. The late Dr. Thomas S. Adams, whose lifelong labors in the field of tax legislation and administration were far-reaching in their effects, discusses in a condensed form the various expedients which have been used or suggested to minimize that type of double taxation. He outlines international and interstate attempts (in many of which he participated as a delegate) to arrive at reasonable agreements designed to avoid undue overlapping of taxes. He emphasizes that while wisdom lies "in giving the tax to the jurisdiction that can successfully administer it," this theory is often hard to apply, and is by no means regularly followed. He sketches the successive decisions of the United States supreme court affecting taxable *situs,* and discusses various practical devices such as reciprocal exemptions and credits. Pointing out the very deep-seated difference in nature between a personal tax on residents as such, and the so-called "impersonal" taxes applicable solely on the ground of *situs,* he concludes that in seeking to minimize double taxation, theory can never be fully satisfied, and the result will always be a compromise:

> "Prevention of double taxation . . . calls for a self-denying ordinance in the home state—rather than concessions in the foreign state. . . . It is a surprising and optimistic phenomenon . . . the number of agreements which an enlightened self-interest makes possible when the matter is approached on practical grounds."

Mitchell B. Carroll summarizes the result of several years' work abroad and at home as to the methods of allocating taxable income in use throughout the world in cases where it appears that more than one jurisdiction is concerned in the production of it.

In the lecture, "The Relations of the Tax Systems of the State and Nation," Professor Robert Murray Haig outlines the difficult problems, theoretical and practical, which arise in this connection and the various theories for harmonizing the conflicting interests. As illustrating how these problems change from time to time, he reminds the reader that in 1837

the federal treasury—very differently situated then than now—had more income than it needed, and distributed a federal subsidy to the States in the sum of more than $28,000,000. He gives a clear picture of the present confusion between taxing jurisdictions, and shows that, much as we hear of the federal government's difficulties in raising sufficient revenue, the States have, at the moment, a more difficult problem. The federal government escapes the difficulties due to the existence of State lines, and does not compete directly, in the tax field, with any of the States in the same sense that they do with each other. As between the federal government and the States, he approves reciprocal credits as a means of lessening injustice; and as regards abolishing or minimizing dual administration he concludes that the only practical way is to assign some types of tax wholly to the States and other types wholly to the federal government, so that the same type will seldom have to be administered both by the federal government and by the State government.

ROBERT N. MILLER.

Washington.

Dean Wigmore writes us as follows: "If your New York friend, who wrote about my review of Mr. Beck's book, will care to read once more my review, he will notice that the misunderstanding arises from the circumstance that when I enumerated 1, 2, 3, the three meanings for bureaucracy, and then later on proceeded to comment on those three meanings, with expressions of disagreement with Mr. Beck on one of them, I reversed the order of topics, and I commented on the 1, 2, 3 items in 3, 2, 1 order. This change of course gave variety to the review, but evidently led to misunderstanding. However, I think this explanation at least clears me of the charge of inconsistency."

In *"A Judge Takes the Stand"* (Alfred A. Knopf, New York) Judge Joseph N. Ulman of Baltimore writes of the law-in-action as observed by a trial judge. Intended primarily to acquaint laymen with the practical working of the law, the book also has an interest and value for lawyers as disclosing the actual operation of the mind of a judge in arriving at his decisions. The style is delightfully personal and informal.

Among other problems incidentally discussed by Judge Ulman is the advisability of attempting to relieve the congestion of court dockets by devising some form of insurance for the victims of traffic accidents. It is surprising that neither Judge Ulman nor others who have recently discussed this question have commented on the fact that Moorfield Storey made such a suggestion more than twenty-five years ago in a lecture at the Yale Law School.

* * *

In catering to the present day appetite for mystery stories the law courts have by no means been neglected. But when using actual trials as a basis authors have usually thought it necessary to fictionize them beyond recognition. Occasionally, however, fiction can not add to the drama and suspense found in the literal transcript. This is true of the Portuguese Bank Note Case in which the English courts have now written the final chapter.

Waterlow & Sons, Ltd. of London were employed by the Bank of Portugal to engrave its notes and after the contract was fulfilled the plates were left in the possession of the printers. A clever gang of swindlers, by means of forged documents, prevailed upon the English firm to print from the original plates and deliver to them a new issue of these bank notes. A charter for a bank was then fraudulently obtained in Portugal and through this bank the notes placed in circulation. Discovering the existence of the spurious notes the Bank of Portugal redeemed them in order to maintain public confidence in its genuine currency.

Thereupon suit was begun in London against Waterlow & Sons Ltd. for breach of contract and negligence in engraving and delivering the unauthorized notes. The final result in the house of lords was a judgment in favor of the Bank of Portugal for £610 392, notwithstanding the fact that it was at no time suggested that Waterlow & Sons had acted otherwise than in the utmost good faith.

Sir Cecil H. Kirsch in *"The Portuguese Bank Note Case"* (MacMillan & Co. Ltd., London) makes an absorbing story of this fraud without in the least embellishing the facts. Indeed, the most interesting chapters are the accurate accounts of the trials in the king's bench division and before the court of appeal and the house of lords.

* * *

After the retirement of Lord Darling from the law courts the English newspapers found the best copy in the decisions of Mr. Justice McCardie, whose recent suicide shocked his countrymen. Himself a bachelor, Sir Henry McCardie was most frequently quoted for his opinions dealing with sex problems and marital rights. As a result of his unconventional point of view and penchant for trenchant obiter dicta Mr. Justice McCardie found himself frequently in collision with the court of appeal. He was on one occasion so severely criticized by one of the members of that court that for a time he declined to furnish his notes for the use of that particular justice. Thirty of Mr. Justice McCardie's opinions are now published under the title of *"Judicial Wisdom of Mr. Justice McCardie"* (Ivor Nicholson & Watson Ltd., London). Some of the decisions are challenging, but the freshness of Sir Henry McCardie's outlook and the pungency of his language make them all excellent reading.

* * *

To his numerous other volumes Sir Edward Parry has added an entertaining autobiography, *"My Own Way."* (Carswell & Company, Ltd., London). Among other good stories are some of Tom Hughes, author of "Tom Brown's School Days," whose fame as a writer has quite obscured the fact that he was once a judge.

* * *

The author assures us that his present volume—*Final Forensic Fables: Second Series,* by O. (Butterworth & Co., Ltd., London)—ends the series. While perhaps not up to the standard set by his three earlier volumes *(Forensic Fables, Further Forensic Fables,* and *Final Forensic Fables)* much humor and not inconsiderable philosophy are packed in these fables dealing with courts, judges and lawyers after the manner of George Ade.

WALTER P. ARMSTRONG.

Memphis, Tenn.

THE NATIONAL INDUSTRIAL RECOVERY ACT

(*Continued from page* 446)

unfair methods of competition, it can empower the President to inaugurate codes of fair competition.

In a criminal statute, precise, unambiguous and definite language must be employed. Legislation which does not clearly define the nature and quality of the offense is unconstitutional.[78] The same degree of definiteness is not however demanded of legislation which is to be executed by an administrative agency. It is sufficient if the broad purposes of the legislature have been manifested and if a reasonably definite guide is afforded for administrative action. Thus the same law may be invalid as a criminal statute and valid as delegation of administrative power.[79]

The criminal penalties of the Recovery Law are directed against violations of the codes, licenses or regulations rather than of the statute itself. Hence the codes, licenses and regulations and not the statute must meet the standards of definiteness required of criminal enactments. The power to enforce administrative rulings and regulations by criminal penalty may be vested in the executive.[80] The validity of the administrative features of the law seems clear. In this discussion, it is assumed that the statute subjects the President's determinations to judicial review. The contrary assumption raises a serious constitutional question.

Due Process of Law

A code, as we have seen, when approved is binding upon and becomes the law for the entire industry. Suppose a code establishes a minimum wage, fixes maximum hours of work, prescribes various working conditions, prevents child labor, prohibits the use of yellow dog contracts, sets minimum and maximum prices, forbids sales below cost, restricts production, requires a license for the expansion of productive capacity, limits the territory in which sales may be made, requires the submission of detailed reports regarding production and sales, and forbids various unfair competitive practices. Should any company violate the provisions of such a code or the regulations of the Recovery Administration, it could be prosecuted criminally and the violation restrained by the Federal Trade Commission or the courts. The company could take the initiative and contest the validity of the code in a suit to enjoin its threatened enforcement.[81] Thus would the constitutional questions be presented to the courts.

Congress evidently cannot delegate to an administrative body regulatory powers which it does not itself possess. No code can be valid unless it could have been made the subject of direct legislation by Congress.

Can Congress establish a minimum wage? The Supreme Court has denied both Congress and the states such power.[82] These decisions must be overturned or held inapplicable during the emergency if the minimum wage provisions in codes are to stand. There is precedent for such reversal by the Supreme Court in its change of attitude toward the regulation of hours of labor which it now permits.[83] The existence of the necessary police power to stamp out child labor is unquestioned. The sole issue in the Dagenhart case was the scope of the Congressional power under the commerce clause. Unless the Supreme Court recedes from its position in the Coppage and Adair cases,[84] the provision in codes prohibiting the use of yellow dog contracts would seem to be invalid. Compulsory price fixing, whether undertaken by the government directly or in partnership with industry, collides with a whole line of Supreme Court decisions.[85] The formula that the court has employed is that only the prices of those industries which are affected with a public interest may be regulated. The category of public interest is unfixed and ever changing.[86] It has been asserted that under present conditions all industries are affected with a public interest.[87] To sustain price fixing which shall be binding upon minorities, the Supreme Court must find (1) that the statute authorizes the exercise of such power, a matter previously discussed, and (2) that the emergency has impressed industry at large with a public interest.[88]

The prohibition of below cost price cutting is easier to sustain, although it must be recognized that the Supreme Court has manifested an aversion to any form of price control.[89] Restraints upon production like price regulations impair the liberty of contract which the Supreme Court has pedestalled

78. Champlin Refining Co. v. Corp. Comm., 286 U. S. 210, 52 Sup. Ct. 559 (1932); U. S. v. L. Cohen Grocery Co., 255 U. S. 81, 89, 41 Sup. Ct. 298, 301 (1921); Cline v. Frink Dairy Co., 274 U. S. 445, 454, 47 Sup. Ct. 681, 687 (1927).

79. Champlin Refining Co. v. Corp. Comm., supra, Note 78.

80. U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480 (1910); Avent v. U. S., 266 U. S. 127, 131, 45 Sup. Ct. 34 (1924).

81. Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397 (1922); see Philadelphia Co. v. Stimson, 223 U. S. 605, 622-3, 32 Sup. Ct. 340 (1912); Allen v. Omaha Live Stock Commission Co., 275 Fed. 1, 5 (C. C. A. 8th 1921); Hannah & Hogg v. Clyne, 263 Fed. 599, 602-3 (N. D. Ill. 1910); cf. National Remedy Co. v. Hyde, 50 F. (2d) 1066 (App. D. C. 1931). The injunction may not run against the President. Mississippi v. Johnson, 71 U. S. 475 (1866).

82. Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923); Murphy v. Sardell, 269 U. S. 530, 46 Sup. Ct. 22 (1925); Donham v. West-Nelson Mfg. Co., 273 U. S. 657, 47 Sup. Ct. 343 (1927). See Powell, The Judiciality of Minimum Wage Legislation (1924), 37 Harvard Law Rev. 545.

No attempt is made at this time to suggest possible lines of distinction between the decided cases and the proposed codes. All that is being attempted is to indicate at the very least the need for distinguishing such cases.

83. Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435 (1917); Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324 (1908); Miller v. Wilson, 236 U. S. 373, 35 Sup. Ct., 342 (1915); Radice v. New York, 264 U. S. 292, 44 Sup. Ct. 325 (1924), overruling Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539 (1905). See Frankfurter, Hours of Labor, and Realism in Constitutional Law (1916), 29 Harv. L. R. 353. See also, B. O. Ry. v. I. C. C., 221 U. S. 612, 31 Sup. Ct. 621 (1911).

84. Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (1915); Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277 (1908); Frankfurter & Greene, Congressional Power over the Labor Injunction (1931), 31 Columbia L. R. 385, 398.

85. Tyson v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927); Ribnik v. McBride, 277 U. S. 350, 48 Sup. Ct. 545 (1928); Williams v. Standard Oil Co., 278 U. S. 235, 49 Sup. Ct. 115 (1929).

86. O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931); German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612 (1914); Hamilton, Affectation with Public Interest (1930), 39 Yale L. J. 1089; McAllister, Lord Hale and Business Affected with a Public Interest (1930), 43 Harv. L. Rev. 759.

87. See address of Senator Wagner, supra note 63 at p. 5258.

88. As was true during the war, Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 49 Sup. Ct. 314 (1929), sustaining price fixing of fuel.

89. Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 47 Sup. Ct. 506 (1927); but cf. Central Lumber Co. v. So. Dakota, 226 U. S. 157, 33 Sup. Ct. 66 (1912). In the public utility fields, the cutting of rates to destroy competition may be forbidden. Public Service Comm. v. Great Northern Utilities Co., 53 Sup. Ct. 546 (1933). Similarly, minimum rates may be established for motor carriers using the public highways. Stephenson v. Binford, 287 U. S. 251, 53 Sup. Ct. 181 (1932). The establishment of minimum prices for milk during the period of the emergency has been upheld by the Court of Appeals. People v. Nebbia, supra, note 58.

but there is a much stronger likelihood of their being upheld if their reasonableness and necessity can be made out.[90] Limitations upon the area of sale present a novel question. Here again the problem is both one of statutory construction as well as constitutionality.[91] Restrictions upon the increase of plant capacity or the construction of new plants or entry into a business are not likely to run the gauntlet of constitutional challenge.[92] No difficulty shou'd be experienced in the elimination of unfair competitive practices or in the submission of reports, provided that the guarantees of the Fourth Amendment are safeguarded.[93]

To enforce obedience to the codes will not be an easy task. The vagueness of the congressional mandate invites frequent litigation respecting the construction and constitutionality of statute and code. The possibility of such litigation can be reduced by obtaining the written consent of every member of a trade to the code approved by the President and an agreement to abide by its terms. The law permits such agreements to be made. It would not be easy at the present time for any business man to withhold his consent without incurring public odium. Association marks might be affixed upon the products of those complying with the code. By voluntary action, constitutional disputes could be minimized.

The Licensing Provisions

Generally speaking, the power to license is as broad as the power to regulate.[94] The number of trades, professions and industries that have been brought under the licensing power of the states is legion. Licenses are to be issued under the Recovery Act to prevent price and wage slashing and to prevent practices that contravene the purposes of the statute. The introduction of goods into commerce is a privilege the enjoyment of which should be subject to federal control.[95] Although the power to prohibit the transportation of articles which are intrinsically harmless has been denied,[96] the writer is of opinion that licenses may be required in any trade where abuses are prevalent which it is in the public interest to eliminate.

The existence of a power to license does not imply the authority to lay down onerous conditions. Thus a certificate of necessity and convenience probably could not be demanded as a prerequisite to the carrying on of a business.[97] The conditions of the license are subject to the same considerations as those previously discussed with respect to the provisions of codes.

Preexisting Contracts

A problem that has been much discussed is the effect of the proposed codes upon pre-existing contracts. The statute does not in terms abrogate and there is no express power given to the administration to modify or invalidate pre-existing contracts. But insofar as stipulations in existing agreements are inconsistent with the express provisions of the law, as for example, yellow dog contracts, their observance, it would seem, has been made unlawful. Are contracts of sale made at a lower price level enforceable notwithstanding that the prices are lower than the new cost of production or lower than the prices fixed by the trade and approved by the administration? The first question to be determined is whether the code is intended to operate retrospectively. Secondly, does the statute warrant such retrospective operation.[98] Thirdly, is such retrospective operation constitutional?[99]

On so complicated a problem, one can do little more than guess. Assuming that the code provision is otherwise valid, and that it is intended to affect pre-existing contracts, the writer is of opinion that there is power to render performance unlawful. Where the effect of the code is merely to make performance unprofitable, as in the case of an increase of wages, the validity of prior sales contracts will be unaffected.[100]

Conclusion

The enumeration in this hasty survey of the constitutional difficulties that will be encountered in the administration of this legislation implies no unfriendliness toward its basic purposes. For the statute in its main aspects to be invalidated would be little short of a major tragedy. But candor demands the admission that for the statute and the codes to be sustained in their entirety requires a change of attitude on the part of the Supreme Court no less revolutionary than the legislation itself.

90. Cf. Champlin Refining Co. v. Corporation Comm., supra note 70; (1931), 31 Columbia L. R. 1170.

91. Cf. Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 Sup. Ct. 114 (1926); see also 52 A. L. R. 669 (1928).

92. New State Ice Co. v. Liebmann, 285 U. S. 262, 52 Sup. Ct. 371 (1932).

93. F. T. C. v. American Tobacco Co., 264 U. S. 298, 44 Sup. Ct. 336 (1924), and authorities cited note 2.

94. Cf. Weller v. New York, 268 U. S. 319, 45 Sup. Ct. 556 (1925); New York ex rel Lieberman v. Van de Carr, 199 U. S. 552, 26 Sup. Ct. 144 (1905); Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190 (1911); Brazee v. Michigan, 241 U. S. 340, 36 Sup. Ct. 561 (1916); Hall v. Geiger-Jones, 242 U. S. 539, 37 Sup. Ct. 217 (1917); Payne v. Kansas ex rel Brewster, 248 U. S. 112, 39 Sup. Ct. 32 (1918).

95. See Wilgus, Federal License or National Incorporation (1905), 3 Mich. L. Rev. 264; Watkins, Federal Incorporation (1918), 17 Mich. L. Rev. 64, 145, 238.

96. Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529 (1918); but cf. Brooks v. United States, 267 U. S. 432, 45 Sup. Ct. 345 (1925). Compare Corwin, Congress' Power to Prohibit Commerce—A crucial Constitutional Issue (1933) 18 Corn. L. Q. 477.

97. New State Ice Co. v. Liebmann, supra note 92.

98. Under the Lever Act, the prices of necessaries fixed by the President were held not to apply to pre-existing contracts. Matthew Addy Co. v. United States, 264 U. S. 239, 44 Sup. Ct. 300 (1924); Standard Chemical and Metals Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566 (1921); Acme-Jones Co. v. Ellis Milling Co., 200 Ky. 811, 255 S. W. 829 (1923).

99. The Constitution inhibits only the states from impairing the obligation of contracts. See New York v. United States, 257 U. S. 591, 601, 42 Sup. Ct. 239 (1922). Whether such impairment results in a denial of due process raises a different question. Cf. Parker v. Davis (Legal Tender Cases), 79 U. S. 457 (1870), overruling Hepburn v. Griswold, 75 U. S. 603 (1869); New York v. United States, supra (power over commerce); Omnia Commercial Co. Inc. v. United States, 261 U. S. 502, 43 Sup. Ct. 437 (1923) (war power), sustaining congressional power.

100. On the distinction between statutes preventing performance or making it factually impossible and statutes which render performance onerous or difficult, cf. Louisville & N. R. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265 (1911); Doherty v. Monroe Eckstein Brewing Co., 198 App. Div. 708, 191 N. Y. Supp. 59 (1st Dept. 1921), with Commonwealth v. Neff, 271 Pa. 312, 14 Atl. 207 (1921); Baker v. Johnson, 42 N. Y. 126 (1870).

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Illinois

Illinois State Bar Association Annual Meeting Program Includes Ceremonies Pertinent to Change of Membership in Illinois Supreme Court

The fifty-seventh annual meeting of the Illinois State Bar Association, held at the Hotel Abraham Lincoln in Springfield, June 21, 22, and 23, was very well attended despite the fairly torrid weather and the general rush of work and activity attendant upon the closing days of the legislative session. In many ways ths meeting was one of the most significant in the recent history of the Association, since it was combined with ceremonies pertinent to the change of membership in the Illinois State Supreme Court. With three justices retiring and three newcomers taking their places, an admirable opportunty was afforded for the Association to give tangible evidence of the bonds that serve ever to link the bench with the bar.

The meeting opened with a business session on the morning of June 21. The various reports of the officers and Board of Governors of the Association were followed by the President's annual address, delivered by Mr. June C. Smith. In his remarks, Mr. Smith dealt with the early history of the Supreme Court of the State of Illinois, a subject most appropriate to the spirit of this particular annual meeting. The address closed with an inspiring appeal to both lawyers and judges to carry on the traditions and worthy ideals that have become associated with this tribunal. The reports of the committees covering the activities of the Association closed the business of this session.

The afternoon of the 21st was devoted to the annual golf tournament, in which many of the members and their guests participated. The golfing was followed by an informal dinner, after which the members and their guests were tendered a reception in their honor by Governor Henry Horner, at the Executive Mansion. One of the leading members of the profession in Illinois, Governor Horner has for many years been identified with the work of the Association.

Thursday, June 22nd, provided a full day of business sessions. Honorable Hugh Green, Jacksonville, a member of the Illinois House of Representatives, opened the morning program with a most interesting summary of the history of the various bills in the recent Legislature sponsored by the Judicial Advisory Council. Mr. Green pointed out the significant changes in the practice and procedure brought about by the enactment of these bills.

Former Governor Henry S. Caulfield, of Missouri, delivered the annual address before the Association at this time. His remarks were concerned with the increasing flexibility of the United States Constitution, centering about recent developments in emergency powers of the executive. That the idea of a rigid and inflexible constitution is giving way to the concept of a wider adaptability to changing needs, as evidenced by the British constitutional law, was amply developed by Governor Caulfield through the citation of current examples of legislative and executive practices once deemed "unconstitutional," but now apparently valid. The expansion of the "emergency" concept in constitutional fields was likewise cited as an example of this increasing latitude in construing the Federal constitution.

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President, Illinois State Bar Association

An interesting part of the program was that taken over by the University of Illinois Law Department, which sent three professors of law to discuss "Recent Trends in Law." The first of these was Professor O. L. McCaskill, whose address on, "The Struggle for Simplicity in Pleadings," was primarily concerned with pleading and practice as they would develop in Illinois under the revised Civil Practice Act, just passed by the State Legislature and becoming effective in January. Professor McCaskill used the comparative method to demonstrate the differences between pleading as at present and as it will be under the new Act. This subject was likewise taken up by former Judge Floyd E. Thompson at the luncheon of the Judicial Section of the Association, following the morning session. A number of interested members of the State judiciary were in attendance at this luncheon, and other group luncheons on this day included the alumni of law schools and State's Attorneys of Illinois.

The afternoon session opened with Professor William E. Britton speaking on "Recent Legislative Proposals in the Field of Banking." Professor Britton discussed at some length the social and economic trends that led up to the enactment of the current banking legislation and pointed out some of the procedure under the new banking rules and regulations. Professor Sveinbjorn Johnson closed this part of the program with a discussion of "Recent Legislative and Judicial Trends in Corporate Law," in which he took up in particular the changes in corporate procedure and powers effected by the recent changes in Illinois of the act applying to general business corporations.

In keeping with the general discussion of recent trends and movements, Mr. Stephen Love, chairman of the Grievance Committee of the Chicago Bar Association, outlined the new procedure in matters coming within the jurisdiction of his and similar committees, in Illinois, under the recent order of the Supreme Court whereby the Grievance Committees of the Illinois State and Chicago Bar Associations are constituted Commissioners of the Court for the hearing of matters pertaining to informations for disbarment or other discipline of lawyers. Mr. Love pointed out that the order of the Supreme Court did not alter the customary procedure now in force, but did have the effect of giving wider scope to the committee investigations and greater powers of enforcement.

Under the title "The Legislature and the Lawyer," two representatives of the Illinois State Legislature presented the activities of their respective Houses as they affected the profession at large. Senator James J. Barbour, representing the Senate, took up the work of the Judicial Advisory Council and pointed to the tangible results of its labors in bills enacted by the recent Legislature. Senator Barbour likewise mentioned the Civil Practice Act as an example of the interest of the legislators in the legal profession and its needs. For the House of Representatives, Honorable John P. Devine discussed various bills that had been recommended by lawyers of the state, and urged the lawyers to strive for greater unity and clarity in presenting their proposals to the legislature.

An address by Dr. Rokuichiro Masujima, of Tokyo, Japan, closed the program of the second day of the annual meeting. Dr. Masujima traced the rise of the Anglo-American Law Institute of Japan and the founding of the Seikiudo Library, in Tokyo. He attributed these developments to the interest of Japanese legal scholars in the Anglo-American system of jurisprudence and expressed the hope that the common law might be adopted in Japan at some future time. In the unification of the world's legal systems, Dr. Masujima finds a peaceful force that may serve to unite the peoples of the world, and he closed with an appeal that the lawyers of America take a leading and active part in activities tending in this direction.

Although the business sessions of the meeting were concluded on the afternoon of June 22nd, the meeting itself continued with two more gatherings of the members and their guests. On the evening of June 22nd, the annual dinner of the Association took the form of a testimonial dinner to Judges Frank K. Dunn, Warren W. Duncan, and Os-

car E. Heard, all of whom were retiring from service on the Supreme Court of Illinois. The proceedings took the form of an argument on appeal, with Honorable Floyd E. Thompson conducting the argument for the appellant Association and the three retiring justices speaking on their own behalf. At this time, the three justices were presented with framed copies of testimonial resolutions adopted at the meeting earlier in the day.

On the morning of June 23rd, members of the Association assembled in the Supreme Court rooms for the ceremony of welcome for the three judges going on the bench, Judges Lott R. Herrick, Elwyn R. Shaw, and Paul Farthing. President June C. Smith made the welcoming speech on behalf of the Association, to which Chief Justice Warren H. Orr responded, on behalf of the court. This is the first time in the history of the Association that such a ceremony had been conducted, and its reception on this occasion bids fair to assure its repetition on future occasions. Following the ceremony, a reception was held in the Supreme Court Library for the incoming judges, and the fifty-seventh annual meeting came to a close.

As the result of the annual election of officers held in conjunction with the annual meeting, Honorable Floyd E. Thompson, of Chicago, will head the Association as its President, for the coming year. Other officers elected include: James S. Baldwin, Decatur, first vice-president; Charles P. Megan, Chicago, second vice-president; Cairo A. Trimble, Princeton, third vice-president; R. Allan Stephens, Springfield, secretary; Frank L. Trutter, Springfield, treasurer. William D. Knight, Rockford, and Henry A. Gardner, Chicago, were elected to the Board of Governors.

R. ALLAN STEPHENS, *Secretary.*

Ohio

Ohio Bar Association Plans Unified Bar Through Rules of Court—New Officers Elected, etc.

Recognizing the existing financial situation, which might affect attendance at its Annual Meeting, the Executive Committee of the Ohio State Bar Association departed from the usual custom of holding a 2½ day Annual Meeting and compressed the program into 1½ day meeting. It worked! The Fifty-fourth Annual Meeting was held on Friday and Saturday, July 7 and 8, at Cedar Point, Sandusky, Ohio.

In order to bring the program within the time limit, the number of invited speakers was not diminished, but time was saved through eliminating places on the program for merely formal reports of committees that had no definite recommendations to make.

President Robert Guinther of Akron, contributed to the compressed program by the expeditious manner in which he conducted the meeting.

President Guinther, in his address upon "Integration of the Bar Through Judicial Order," abandoned the idea of appealing to the Legislatures to coordinate the bar and suggested the more flexible plan of cooperation through an

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President, Ohio State Bar Association

order of the court. At the conclusion of that address, the incoming President was directed to appoint a committee to prepare proposed Rules of Court for the establishment and government of a unified bar.

Secretary J. L. W. Henney of Columbus, in his report dwelt upon the Regional Meetings fostered by the State Bar Association and the 1000 service requests received and acted on by headquarters during the Association year.

The Prosecuting Attorneys' Section, with Col. G. L. Yearick of Newark, presiding, was addressed by Assistant Attorney General of Illinois, Emory Smith of Chicago, upon "Does the United States need a Dictator to Curb Lawlessness?" The Prosecuting Attorneys' Section will be guided during the ensuing year by Prosecuting Attorney C. G. L. Yearick of Newark as Chairman and Prosecuting Attorney Donald J. Hoskins of Columbus, as Secretary.

The report of the Committee on Judicial Administration and Legal Reform as presented by Chairman W. J. Stevenson of Cleveland, recited that the Ohio courts in general are functioning with commendable efficiency; that a sub-committee was approaching various Courts of Appeals to eliminate publication of cumulative and unnecessary opinions; that the uniform declaratory judgments act had been passed by the Legislature; that the committee, under sub-chairman Henry G. Binns of Columbus, was considering uniform lower courts, involving abolition of justice of peace and other inferior courts and transferring their jurisdiction to the common pleas court, with power to appoint commissioners or referees; that a special committee was considering bar referendum to endorse candidates for judges of the Supreme Court and Courts of Appeals; that courts should be permitted to render judgments *non obstante veredicto* although motion to direct verdict had been overruled and verdict returned; that the legislature had adopted a bill, as recommended by the committee, authorizing service of summons on non-resident motor vehicle owners; that the committee proposes to submit to regional meetings a report upon a new divorce code, as well as a report on joinder of parties and actions. The Annual Meeting directed the committee to continue its efforts to secure passage of a uniform federal judgment lien law and a law authorizing suits against the state for damages arising from negligent maintenance of state highways.

Chairman Frank X. Schaut of Cleveland reported for the Legislation Committee, that that committee had successfully opposed a bill providing that laymen may practice in probate courts and a bill to permit labor organizations to provide counsel for its members, both of which were contrary to principles promulgated by the Association. Chairman Schaut reported that six Association measures had been passed by the legislature; i. e., (1) permitting remission of fines and penalty in liquor prosecutions, (2) uniform declaratory judgments law, (3) two bills amending the domestic and foreign corporation acts, (4) two bills amending the criminal code. The committee also appeared before the legislative committees and presented the bar association's views on outside legislation. Fourteen bills of the Ohio Bar legislative program were not passed, due to legislative congestion rather than opposition.

Carlton S. Dargusch of Columbus, a member of the State Tax Commission, gave an intimate and interesting picture of the taxation situation in Ohio.

The report of the American Law Institute Committee was presented by Wm. L. Hart of Alliance, and stated that the two-volume Restatement of Contracts with Ohio annotations is now being distributed.

The Probate Law Committee reported through Chairman A. G. Fuller of Findlay, that the committee was successful in minimizing amendments to the code adopted two years ago and was instrumental in preventing the Legislature from passing bills inimical to the policies of that legislation. The committee expressed its opposition to a bill preferring uninvested trust funds in the commercial department of a bank in process of liquidation.

The special committee regarding Bar Examinations reported it had recommended the following changes to the Supreme Court: (1) limiting number of examinations to three, with one year of approved study between examinations; (2) elimination of law office study; (3) requiring increase of 3 per cent higher grade on second examination and 5 per cent higher grade on third examination (this recommendation was not approved by the Association); (4) elimination of bailments, partnership and suretyship from examination subjects and substitution of trusts and conflict of laws, together with either insurance, municipal corporations, public utilities or taxation in lieu thereof, and the inclusion of the subject of mortgages within the subject of real property; (5) the addition of the requirement that the applicant shall pass by a grade of 75 per cent a separate examination upon the Canons of Professional Ethics of the American and Ohio State Bar Associations; and (6) the

adoption of a rule to cover investigation and determination of fitness and character of applicant at time of registration. The Association Annual Meeting approved all of the foregoing excepting the recommendation increasing grades after failure at an examination.

The annual dinner was less formal than former years with only one speaker, John W. Raper, paragrapher of the *Cleveland Press*, who spoke in a humorous vein on "Your Honor, I Object!"

Immediately following the dinner, the meeting resolved itself into a session of the Conference of Bar Association Delegates, when the Selection and Tenure of Judges was discussed. Hon. Robert N. Wilkin of New Philadelphia outlined the work of the Committee on Judicial Administration and Legal Reform, which suggested the appointment of judges by and with the approval and consent of a judicial commission. The general subject was referred back to the above named committee for further consideration.

At the Saturday morning session, the Committee on Legal Ethics, reporting through its Chairman, former Judge George E. Mills of Cincinnati, recommended that the bankruptcy rules be amended to forbid any claim to be voted for the election of a trustee procured through solicitation by a lawyer or lay agency and to require every proof of claim to contain the statement that the claim had not been so solicited.

Hon. Wm. H. Boyd of Cleveland, former President of the Cleveland Bar Association, delivered a very forceful address on "Banking Laws, Practices and Liquidation," recounting evils developed by recent depression, suggesting enforcement of stockholders' double liability before a bank's failure, limiting directorate to 15 members, providing that directors have definite duties with penalty for failure to perform them, prohibiting directors from lending bank's funds to themselves or corporations in which they are interested, conforming Ohio law to the Glass-Steagall Bill, separating functions of commercial savings investment and trust banking, prohibiting commingling of trust and commercial funds, and vesting liquidation in depositors.

Chancellor John Wesley Hill of Lincoln Memorial University, Cumberland Gap, Tennessee, delivered an informative and scholarly address upon the "Ideals of Lincoln, the Lawyer."

The membership committee report contained the names of 110 members.

Incidentally, the Treasurer's report showed the Ohio State Bar Association to be ahead of its budget for the first six months of 1933 in bank balance.

The following officers were elected: President, A. R. Johnson, Ironton; Secretary and Treasurer, J. L. W. Henney, State House Annex, Columbus.

Executive Committee (for 5 years), Fred W. Warner, Marion; Charles W. Racine, Toledo; W. P. Ainsworth, Medina; Chas. D. Fogle, Marietta, and Oscar A. Stephens, Youngstown.

Vice Presidents, Geo. E. Mills, Cincinnati; W. A. Miller, Xenia; Grant E. Mouser, Marion; Russell K. McCurdy, Portsmouth; W. F. Garver, Millersburg; Samuel R. Williams, Toledo; Louis L. Guarnieri, Warren; John H. Schultz, Cleveland; Geo. H. Barnard, Wooster. J. L. W HENNEY, *Secretary.*

Tennessee

EARL KING
President, Tennessee Bar Association

Report of Annual Meeting of Bar Association of Tennessee, Knoxville, Tennessee, June 9 and 10, 1933

The Bar Association of Tennessee enjoyed one of its most successful annual meetings at Knoxville last month. The attendance was the largest the Association has had in recent years, there being nearly 500 lawyers in attendance. The officers elected for the year 1933-34 are as follows:

Earl King, Memphis, President; E. F. Smith, Morristown, Vice-President, East Tennessee; Louis Leftwich, Nashville, Vice-President, Middle Tennessee; W. P. Moss, Jackson, Vice-President, West Tennessee; James E. Atkins, Jr., Knoxville, Treasurer; A. L. Heiskell, Memphis, Secretary.

The guest speaker at the annual banquet was the Honorable Ed. Morrow, ex-governor of Kentucky, whose "Stories of Bench, Bar, and Stump" was one of those gems of humor which will long linger in the memories of those present.

The principal address of the meeting was "The Future of Our Constitution" delivered by the Honorable James M. Beck, former Solicitor General of the United States. It is impractical to here attempt to convey any conception of the striking personality and convincing sincerity with which Mr. Beck presented his treatise; or to give to your readers any idea of his attractive use of familiar literary illustrations to make clear his logical deductions.

The President's reception after the address afforded an opportunity for the members to meet Mr. Beck.

The "high-point" in the entertainment of the visitors was an automobile trip tendered by the Knoxville Bar through the new Smoky Mountain National Park to "Indian Gap," the highest point in the new National Park, which can be reached by automobile, and which is located on the boundary line between Tennessee and North Carolina. The mountain laurel and rhododendron were in full bloom, and added immensely to the beauty of this scenic spot.

The Knoxville Bar also tendered to the visitors an annual dinner and two luncheons, one of which was served in the Smoky Mountain National Park. The Alumni of the various law schools represented by the lawyers present at the meeting gathered at breakfast on the morning of the second day, following to a certain extent the custom of the Alumni meetings held at the annual convention of the American Bar Association.

LONGSTREET HEISKELL, *Secretary.*

Texas

Fifty-second Annual Meeting of the Texas Bar Association—Substantial Progress Made Toward Passage of Self-Governing Bar Bill.

The Fifty-second Annual Meeting of the Texas Bar Association was held at Corpus Christi on the 6th, 7th and 8th days of July. Three hundred and fifty members registered at the meeting.

The business sessions were well attended. One of the most important features of the business meetings was the report of Mr. Harry P. Lawther, President of the Association and Chairman of the Special Committee on the Self-Governing Bar Bill. Mr. Lawther reported that the bill, after some amendments, was passed in the Senate but that it was finally killed in committee by the House. A general discussion of the bill followed which was participated in by several members of the Legislature. The bill is becoming better understood by the bar generally and substantial progress has been made toward its

JOHN C. TOWNES
President, Texas Bar Association

passage. The Association again unanimously endorsed the bill and the special committee was continued.

The out-of-state speakers were Honorable William L. Ransom of New York City, whose address was entitled "Public Opinion and the Bar," and Honorable Charles A. Beardsley of Oakland, California, whose address was entitled "Lay Encroachments." Both Mr. Ransom and Mr. Beardsley likewise appeared on the program at the banquet.

One of the outstanding entertainment features of the meeting was the barbecue at the King Ranch at Kingsville, Texas. The King Ranch is still the largest ranch in the world, containing something over a million acres. Several hundred persons attended the barbecue.

The meeting was concluded with the annual banquet. Mr. C. T. Freeman of Sherman was Toastmaster, and speakers included Mr. Beardsley, Mr. Ransom, Mr. Dudley Tarlton of Corpus Christi and Mr. Richard Kleberg of Corpus Christi.

The following officers and directors were elected: John C. Townes of Houston, President; Henry P. Burney of San Antonio, Vice-President; George C. Gaines, Jr., of Houston, Secretary; W. T. Armstrong of Galveston, First District; W. E. Fitzgerald of Wichita Falls, Second District; Ben H. Powell of Austin, Third District; L. Hamilton Lowe of Corpus Christi, Fourth District; D. A. Frank of Dallas, Fifth District; Will C. Hurst of Longview, Sixth District; H. C. Pipkin of Amarillo, Seventh District; Julian P. Harrison of El Paso, Eighth District; Charles T. Butler of Beaumont, Ninth District; James P. Alexander of Waco, Tenth District and Mr. Thomas R. Smith of Colorado, Eleventh District.

GEORGE C. GAINES, JR., *Secretary.*

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North Carolina

North Carolina Bar Association Approves World Court Protocols—Executive Committee to Study New Bar Incorporation Act —President Martin Delivers Address

The thirty-fifth annual meeting of the North Carolina Bar Association was held at the Oceanic Hotel, Wrightsville Beach, July 6, 7 and 8. Harriss Newman of the Wilmington Bar delivered the address of welcome, which was responded to by D. Ed Hudgins of the Greensboro Bar. Following the address of President Kemp D. Battle on "The Lawyer and the Public," an address was delivered by J. Gilmer Koerner, of Washington, D. C., entitled "The Lawyer in a Revolutionary State."

On the evening of July 7 an address was delivered by U. S. Circuit Judge John J. Parker of Charlotte on "The Proposed New State Constitution," which is to be voted on in 1934. Representing the younger members of the Bar, Ray S. Farris of Charlotte addressed the gathering on the subject "The Young Lawyer's Search for Leadership."

At the concluding session on July 8 Hon. Clarence E. Martin, President of the American Bar Association, delivered an address on "Our Growing Federal Power," being introduced to the audience by Governor J. C. B. Ehringhaus.

A resolution was adopted instructing

the Executive Committee to make a study of the new State Bar Incorporation Act, which went into effect July first, to the end that co-ordination with the present Association might be effected and conflicts between the two organizations prevented. I. M. Bailey, Chairman of the Committee on Incorporating the Bar, explained the features of the new act and was instructed to prepare by-laws to be submitted for adoption at the organization meetings of the lawyers in the twenty judicial districts in the State.

Dean Justin Miller of the Duke University Law School offered a resolution which was adopted re-affirming the request of the Bar Association last year that the United States Senate approve the three protocols for adherence to the World Court. Dean M. T. Van Hecke of the University of North Carolina Law School reported progress on the work of annotating North Carolina cases in connection with the restatement of the law of contracts by the American Law Institute.

The following were elected officers for the year 1933-34. J. Elmer Long of Durham, President; Zeb V. Nettles, of Asheville, J. B. Cheshire, Jr., of Raleigh, and W. F. Taylor, of Goldsboro, Vice-Presidents; Henry M. London, of Raleigh, Secretary-Treasurer; B. M. Covington, of Wadesboro, E. Earle Rives, of Greensboro, on the Executive Committee, the hold-over members being R. O. Everett, of Durham, Chairman, H. E. Stacy, of Lumberton, Hamilton C. Jones, of Charlotte, and Thomas W. Davis of Wilmington.

HENRY M. LONDON,
Secretary.

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CONVENTION TIME

Shorthand reporters keep abreast of the times professionally by local, state and national meetings where addresses are made and discussions had on their work. At the annual meeting of the *National Shorthand Reporters Association* system clinics are also held at which word signs and short cuts in the several lines of law and convention reporting are demonstrated and analyzed with respect to standardization, legibility, freedom from conflict, and adaptability to fluent and accurate writing at high speed. The 1933 meeting of the N. S. R. A., which has a membership of 1,000 embracing all the states, will be held at the Stevens Hotel, Chicago, August 21-25.

A. C. Gaw, Secretary,
Elkhart, Indiana.

"The Record Never Forgets"

Miscellaneous

Thomas R. Lyons, former vice president of the Seattle Bar Association and one-time federal judge in Alaska, was elected president of the association at its annual election meeting. He succeeds Otto B. Rupp. Other new officers are William G. Long, first vice president; Charles T. Donworth, second vice president; John Ambler, treasurer; Paul P. Ashley, secretary; Raymond G. Wright, Henry Elliott, Jr., and Donald A. McDonald, trustees.

Attorney W. C. Campbell of Palestine, was elected president of the Texas Bar Association for the First Supreme Judicial District of Texas, at a recent meeting of that body. Bryan F. Williams of Galveston was elected vice president, and Henry Flagg of Galveston was named secretary-treasurer. W. T. Armstrong, also of Galveston, was nominated for director of the Texas Bar Association from the First District.

The Movement for Bar Integration

The most illuminating experience under state bar unification is that of Oklahoma. The bar act was adopted during a period of great political stress. The State Association, numbering about twelve per cent of the entire bar, approved the idea in 1928 and the legislature acted in 1929. Only a few of the bar leaders were committed to the plan for integration under statute. It was necessary to convert to the new regime more than 3,000 active practitioners. So well was that done that attempts to repeal the act in the last general assembly met with emphatic defeat. Repeal bills were introduced in both chambers. In the house a record vote was reached and the bar act was sustained by an overwhelming majority. Protests against repeal signed by ninety percent of the lawyers of the state were presented to representatives and senators, and, according to former President de Meules, a little further time would have brought protests from five per cent more.

The Proceedings of the third annual meeting of the Oklahoma State Bar, published in the State Bar Journal for April, are replete with information concerning the successful operation of the unified organization. Incidental to the attempt to repeal the act every detail of operation was scrutinized by a committee of the House, and the result was that adequate appropriations were made for the next two years. In Oklahoma the annual dues of members are payable to the state treasurer. In his address President Utterback said:

"The layman is beginning to recognize the fact that the reckless accusation of misconduct against an attorney must stop and that there is a committee to whom the complaining party should go and before whom he should lay his complaint and he is getting less and less sympathy and encouragement in his slander of the innocent. The layman also is beginning to understand that the lawyer who violates his duties to his client or proves recreant to his trust can and will be held responsible in a proper forum, who will without unnecessary delay, investigate and recommend proper action."

President Utterback further predicted that selective admission to practice would permit the bar virtually to guarantee efficient and honest services to clients. He added:

"This must redound to the benefit of the lawyer, for the very fact that he is a member of the Bar of Oklahoma will carry with it the seal of approval of an organization that demands that he be of that particular high moral character, as well as the possessor of such learning, as to justify the guarantee by the members of the profession."

This appears to be the essence of integration—joint responsibility, with resultant benefits for all concerned.

The final report on legislative efforts during the first half of this year is to the effect that earnest attempts to secure bar organization statutes failed in Montana, Texas and Michigan. Next year the lawyers of Kentucky and Virginia will doubt less renew their attempts. In the former state success was nearly reached on two former occasions. Virginia may be encouraged by the fact that the plan of organization there originated was enacted this year in North Carolina.

At its last annual meeting the Massachusetts State Bar Association amended its constitution to provide for membership by local associations on payment of a nominal sum. Thereafter the members of such local associations are acceptable as members of the state body without formal recommendation. The vital need for protecting the profession and the public against unlawful practice has aroused lawyers to the point of planning a new state organization. It is to be hoped that the present State Bar will enroll all lawyers who have any interest whatsoever in strengthening the profession.

The greatly admired Massachusetts Law Quarterly rendered a public service by presenting in its March and May numbers the report of the governor's commission on liquor control and a history of the subject extending over three hundred years. The report was based upon extended studies in other lands and was accompanied by a most persuasive plan for state control, which, in its larger aspects, is adaptable to the needs of any and all states.

The movement for restricting admission to practice to worthy applicants, which has influenced professional thought increasingly through the past decade, has of late taken the form of assisting and encouraging young lawyers. In Illinois the State Bar Association has organized the students in the three leading law schools; it finds offices for them to work in during vacations; it makes of admission a significant ceremony; and after admission it finds offices where the practical side of law practice can be learned. A state association which does this builds for the future and is assured of bountiful returns.

In California the leading schools give to their students a thorough understanding of the collegiate duties of the bar. An excellent explanation of such study in the Law School of Leland Stanford University was published in the May number of this JOURNAL, page 305. An old practitioner cannot read Professor Turrentine's article without realizing that a gulf separates the bar of tomorrow from the bar of yesterday. By the explicit assumption of public duty the lawyer is elevating his position in government and in society.